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# Accountability for delegated and implementing acts after the Treaty of Lisbon

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**Abstract:** *The comitology regime, the committee-based system developed as a mechanism for controlling the Commission's exercise of its powers to implement EU measures, has been subject to severe criticism on grounds of lack of accountability and transparency. The system has recently been fundamentally reformed by means of the new Implementing Acts Regulation, which came into force on 1<sup>st</sup> March 2011. This paper investigates whether the new rules are sufficient to remedy accountability deficits as regards implementing acts, and concludes as far as accountability to the Member States is concerned, their control powers have remained static.*

*In addition, the new delegated acts procedure introduced by the Treaty of Lisbon grants the European Parliament (EP) more control powers, although the EP's gains are more modest than they might appear. This change has come at the cost of reduced control powers for Member States as well as lowered standards of transparency for the public.*

## I Introduction

This paper takes as its focal point problematic aspects of the procedures for adopting delegated and implementing acts, known pre Lisbon as the comitology regime, and now replaced by Articles 290 and 291 TFEU along with the new Implementing Acts Regulation.<sup>1</sup> It was often alleged in some comitology literature that the comitology regime suffered from being insufficiently transparent and accountable.<sup>2</sup> This paper first of all examines the meaning of accountability and its linkage to the field of comitology. It then outlines the deficits of the pre-Lisbon comitology regime from the point of view of accountability, and examines in detail whether the framework incorporated by the Lisbon Treaty, as applied to date in practice, mitigates the accountability deficits inherent in the pre Lisbon comitology procedure. The paper contends that the latest developments regarding delegated and implementing acts are unlikely to remedy the accountability deficits inherent in this area. More specifically, as regards implementing measures, accountability to the Member States remains the same, at least on a transitional basis, although the Council (as distinct from Member States) no longer has a significant role. But there has been no improvement as regards transparency standards for the public. As regards delegated acts, the EP has impressive control powers, at least in theory, although as compared to the previous Regulatory Procedure with Scrutiny (RPS), the predecessor of the delegated acts process, in practice the EP's gains are more modest than they might appear. For the public, the development of the delegated acts process has actually worsened the standards of accountability.

## II The conceptual framework of European Union Accountability

Assessing whether delegated and implementing acts suffer from accountability deficits, along with examining alternatives on how to mitigate these deficits, presupposes a clear understanding of the meaning of accountability. This exercise in definition is more problematic than might at first be supposed. This section therefore begins by explaining accountability in order to understand what is, and what is not, meant by this concept. Secondly, it analyses the reasons why more accountability is being called for in the EU. Lastly, the section examines the requirements of accountability with particular reference to the present level of accountability and transparency in the EU. By doing so, it attempts to build an appropriate foundation to be used as an essential tool for the analysis in the following sections.

### *A Setting out the concept: Explanation of accountability*

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<sup>1</sup> Reg 182/2011, [2011] OJ L55/13.

<sup>2</sup> G. Brandsma, 'Accountability deficits in European "Comitology" Decision-making', (2007) 11 *European Integration Online Papers*; C. Neuhold, 'Taming the "Trojan Horse" of Comitology? Accountability issues of Comitology and the Role of the European Parliament', (2008) 12 *European Integration Online Papers*; G. Brandsma, D. Curtin and A. Meijer, 'How Transparent are EU "Comitology" Committees in Practice?', (2008) 14 *European Law Journal* 819.

Accountability is a term frequently used in EU documents: 'we live in the age of accountability, wherever one looks there is a discussion and debate over accountability';<sup>3</sup> the word 'crops up everywhere performing all manner of analytical and rhetorical tasks and carrying most of the burdens of democratic "governance"'.<sup>4</sup> The importance of accountability is highlighted in relation to almost every issue, from the provision of public services<sup>5</sup> and criminal justice<sup>6</sup> to transnational governance regimes.<sup>7</sup> Indeed, in this new age of governance, accountability has come to stand as an essential feature, if not the most important feature, of any system of governance in which the exercise of public power has been extended beyond the boundaries of the nation state. Such accountability has the ability to ensure that the different modes of governance are legitimate. The reason for this is the existence of 'a common assumption that accountability is an autonomous and neutral feature of any governing system national or transnational'.<sup>8</sup>

However, accountability is an important yet elusive term that bears different meanings, and its characteristics differ depending upon the context. It is a broad concept that reflects a variety of understandings rather than a single paradigm<sup>9</sup> and, in fact, in the literature there seem to be as many definitions of accountability as there are scholars.<sup>10</sup> The relevant literature identifies distinct types of accountability, such as legal, democratic, financial, political, administrative and electoral.<sup>11</sup> Also, commentators suggest that accountability can be internal, external or horizontal or vertical, formal or informal.<sup>12</sup>

Historically, accountability is closely related to the term 'to account' in its literal sense of bookkeeping.<sup>13</sup> Its origins can be found in an English idea emerging in the decades following the 1066 Norman Conquest, and more specifically from William I's efforts to establish and legitimise his rule over England at the end of Henry II's reign (1189).<sup>14</sup> All property holders at this time were required to 'render a count' of what they possessed in the terms set by the King's agents. This term, however, has arrived in the literature, and particularly into the legal research, quite recently, and was not in common use outside the financial contexts of accountancy and auditing.<sup>15</sup>

<sup>3</sup> E. Fisher, 'The EU in the Age of Accountability', (2004) 24 *Oxford Journal of Legal Studies* 495, 495.

<sup>4</sup> R. Mulgan, "Accountability": an Ever-Expanding Concept?, (2000) 78 *Public Administration* 555, 555.

<sup>5</sup> A. Davies, *Accountability: A Public Law Analysis of Government by Contract* (Oxford University Press, 2001).

<sup>6</sup> D. Roche, *Accountability in Restorative Justice* (Oxford University Press, 2003).

<sup>7</sup> A-M. Slaughter, 'The Accountability of Government Networks', (2001) 8 *Indiana Journal of Global Legal Studies* 347.

<sup>8</sup> Fisher, *op cit* n 3 *supra*, at 496.

<sup>9</sup> D. Curtin, and A. Nollkaemper, 'Conceptualizing Accountability in International and European Law', (2005) 36 *Netherlands Yearbook of International Law* 3.

<sup>10</sup> Brandsma, *op cit* n 2 *supra*, at 2.

<sup>11</sup> D. Oliver, *Government in the United Kingdom: The Search for Accountability, Effectiveness and Citizenship* (Open University Press, 1991).

<sup>12</sup> C. Scott, 'Accountability in the Regulatory State', (2000) 27 *Journal of Legal Studies* 38.

<sup>13</sup> E. Normanton, *The Accountability and Audit of Governments: A Comparative Study* (Manchester University Press, 1996).

<sup>14</sup> M. Dubnick, 'Seeking Salvation For Accountability', Paper presented at the annual meeting of the American Political Science Association (2002), Boston Marriott Copley Place, Sheraton Boston & Hynes Convention Centre, Boston, Massachusetts.

<sup>15</sup> Davies, *op cit* n 5 *supra*.

The reason for this appears to be that 'accountability is not a term for art for lawyers'.<sup>16</sup> Lawyers have never had an exclusive right to use the term.<sup>17</sup> Rather, lawyers rely on the classical vocabulary of the rule of law, liberty, democracy and respect for fundamental rights and freedoms. Indeed, it is the rule of law that forms part of the constitutional law vocabulary, not the concept of accountability *per se*.

### *B Reasons for accountability: The core meaning of the term*

In the contemporary literature the term 'has come to stand as a general term of any mechanism that makes powerful institutions responsive to their particular publics'.<sup>18</sup> While citizens delegate power to their representatives, they have reasons to hold them accountable. '[A]ccountability is a factor in legitimacy and one that begins to run neck and neck with representation'.<sup>19</sup> Accountability is meant to keep a democratic check upon actions of those exercising public power to ensure that the preferences of the voters are translated into policy. It also ensures that the terms on which political power is authorised are duly observed. It refers to the fact that decision-makers do not enjoy unlimited autonomy but have to explain and justify their actions.<sup>20</sup> There is, therefore, 'an unquestionable thirst for accountability that cuts across the political spectrum'.<sup>21</sup> Where public policy does not correspond to the ultimate preferences of the people, accountability mechanisms come into effect.

In a concrete sense, there is a strong need for the public to know how public money is spent and to receive assurances that it has been well spent.<sup>22</sup> This relates to the public interest in knowing how it is governed.<sup>23</sup> The executive of any public organisation has in its possession the taxpayers' money. With the right to use that money on behalf of the public comes the obligation to use it wisely. The executive must therefore be held accountable for doing so, and face the consequences if it does not.<sup>24</sup>

A suitable definition of the term is provided by Bovens. Accountability is a 'relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences'.<sup>25</sup> In other words, 'A is accountable to B when A is obliged to inform B about A's (past or future) actions and

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<sup>16</sup> C. Harlow, C. 'European Governance and Accountability', in N. Bamforth and P. Leyland (eds), *Public Law in a Multi-layered Constitution* (Hart, 2003), at 79.

<sup>17</sup> *Ibid.*

<sup>18</sup> R. Mulgan, *Holding Power to Account, Accountability in Modern Democracies* (Palgrave Macmillan, 2003), at 8.

<sup>19</sup> A. Benz, Y. Papadopoulos and C. Harlow 'Special Issue: Accountability in EU Multilevel Governance', (2007) 13 *European Law Journal*, 441, 442.

<sup>20</sup> C. Lord, *Democracy in the European Union* (Sheffield Academic Press, 1998).

<sup>21</sup> M. Moore and M. Gates, *Inspectors-General: Junkyard Dogs or Man's Best Friend?* (Russel Sage Foundation, 1986), at 1.

<sup>22</sup> M. Power, *The Audit Society, Rituals of Verification* (Oxford University Press, 1997).

<sup>23</sup> D. Osborne and T. Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (Plume, 1992).

<sup>24</sup> R. Behn, *Rethinking Democratic Accountability* (Brooking Institution Press, 2001).

<sup>25</sup> M. Bovens, 'Analysing and Assessing Accountability: A conceptual Framework', (2007) 13 *European Law Journal* 4, 447.

decisions, to justify them, and to suffer punishment in the case of eventual misconduct'.<sup>26</sup>

In its fundamental sense, therefore, accountability means being answerable for one's actions to some authority and, if necessary, having to suffer sanctions for actions not in accordance with the mandate granted by that authority. In concrete terms, this form of accountability can be said to break down into four major elements: the setting of standards, the obtaining of an account, the judging of such an account and a decision about the consequences that arise from such a judgment.<sup>27</sup>

### *C Requirements of Accountability*

The first feature of accountability is that there must be at least two different persons or bodies in an external relationship, in the sense that the account must be given to some other body or person outside the person or body being held accountable (the forum). Also, there needs to be a social interaction and exchange between the one who calls for the account and the one who is being held accountable. The former asks questions while trying to scrutinise the other party, whereas the latter answers and suffers the sanctions where necessary. This definition of accountability combines justification by the accountability holdee to the accountability holder, with availability to the latter of applying sanctions *vis-à-vis* the former.<sup>28</sup>

Another feature of accountability is reparation and/or effective redress.<sup>29</sup> Put simply, there is a strong need to put matters right in the event of errors. In fact, accountability, besides leaving the accountee liable for giving an explanation of actions and suffering the consequences for those actions where appropriate, entails that the accountee must, in addition, 'undertake to put matters right if it should appear that errors have been made. In other words it is explanatory and amendatory'.<sup>30</sup> This is in line with the argument that accountability operates prospectively and retrospectively and, as such, encompasses the 'fire watching' function of legislation and regulation.<sup>31</sup> This statement brings into play the definition of control as 'periodic checking and examination of the activities of public officials by external actors possessed of formal or constitutional authority to investigate, to grand quietus or to censure, and in some cases even to punish'.<sup>32</sup>

However, accountability is often understood as a process that operates retrospectively in the sense that it involves giving an account of a prior conduct. Such views, however, have been challenged by approaches that see accountability

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<sup>26</sup> A. Schedler, 'Conceptualizing Accountability', in A. Schedler, *The Self-Restraining State: Power and Accountability in New Democracies* (Lynne Rienner Publishers, 1997), at 17.

<sup>27</sup> Davies, *op cit* n 5 *supra*.

<sup>28</sup> Schedler, *op cit* n 26 *supra*.

<sup>29</sup> Davies, *op cit* n 5 *supra*.

<sup>30</sup> D. Oliver, *Government in the United Kingdom: The search for Accountability, Effectiveness, and Citizenship* (Oxford University Press, 1991), at 24.

<sup>31</sup> Brandsma, *op cit* n 2 *supra*.

<sup>32</sup> C. Lord, 'The Hidden Public Sector: The "Quangocratization" of the world', in G. Kaufmann, G. Majone, and V. Ostrom, *Guidance, Control and Evaluation in the Public Sector* (de Gruyter, 1986), at 766.

as more of an on-going process.<sup>33</sup> Though accountability has mainly to do with wrongdoing that has taken place in the past, the objectives of the accountability process are increasingly accompanied by more forward-looking methods. These methods have more to do with ways to prevent failures from happening again.

What can therefore be designated as the original or the core meaning of the term is the liability to give an account or explanation of actions and, where appropriate, to suffer the consequences, take the blame or undertake to put matters right if it should appear that errors have been made.<sup>34</sup> Decision-makers must be obliged to justify their actions and not be allowed to rely on claims that their rightness is to be assumed. It is crucial to have provisions for matters to be put right when things have gone wrong. The emphasis on accountability can be either on 'giving account' or on 'holding to account'.<sup>35</sup> The former concentrates on disclosing information and on justifying behaviour, leaving the possibility of sanction as an option and not the main focus of the concept. The latter not only entails the obligation to disclose information and to justify actions, but also, and more importantly, that the actors should be in a relationship with another forum which has the power to impose sanctions and to give rewards.<sup>36</sup>

#### *D Accountability in the EU*

In the context of the EU, the need for accountability is augmented by the 'democratic deficit' which some have argued exists within the EU at various levels.<sup>37</sup> Members of the EU institutions, offices, bodies and agencies - with the notable exception of the EP- are not elected directly by the people and can be removed from their positions only in the most extreme circumstances. While accountability within the EU context is often characterised as a principle for an era of innovative governance, a common statement by many commentators is that, not only is the EU not accountable enough but that accountability deficits are even growing, compromising the legitimacy of the EU.<sup>38</sup>

EU debates about the accountability of political systems therefore reveal concerns over how to make decision-making more democratic and legitimate and to ensure that delegated power is controlled. In the case of the EU, the above-mentioned notion of democratic accountability, in the sense of a process by which the government has to present itself for re-election, does not exist. Indeed, at the EU level governments are not elected.

There is an argument that the EU's 'democratic deficit' is exaggerated, because the EU is not responsible for many of the issues of key concern to citizens such as

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<sup>33</sup> J.M. Moncrieffe, 'Accountability: Ideals, Ideas, Constraints', (2001) 8 *Democratization* 26.

<sup>34</sup> Oliver, *op cit* n 30 *supra*.

<sup>35</sup> R.W. Grant and R.O. Keohane, 'Accountability and Abuses of Power in World Politics', (2005) 99 *American Political Science Review* 29; Mulgan, *op cit* n 4 *supra*; Harlow, *op cit* n 16 *supra*; Oliver, *op cit* n 30 *supra*; Scott, *op cit* n 12 *supra*.

<sup>36</sup> Mulgan, *op cit* n 4 *supra*.

<sup>37</sup> Curtin, *op cit* n 9 *supra*; Brandsma, *op cit* n 2 *supra*; Neuhold, *op cit* n 2 *supra*.

<sup>38</sup> M. Bovens, D. Curtin and P. Hart, *The Real World of EU Accountability, What Deficit?* (Oxford University Press, 2010); A. Arnall, 'Introduction: The EU's Accountability and Legitimacy Deficit', in A. Arnall and D. Wincott, *Accountability and Legitimacy in the EU* (Oxford University Press, 2002).



taxation, health care and pensions, and is in any event more accountable than other international institutions or processes.<sup>39</sup> Nevertheless, while it might reasonably be argued that it is not necessary that the end of political accountability at the EU level is to have an elected government, it is still necessary to ensure a sufficient degree of democratic legitimacy and accountability for the EU, given that it has developed into a political union with policies stretching far beyond the original aims of eliminating barriers to cross border economic activities, for example in fields such as consumer protection, occupational health and safety and environmental policy, and having a greater public impact than other forms of interaction between States. There has long been a concern that the trend toward forceful EU policy making is not being matched by an equally forceful move to create appropriate accountability regimes.<sup>40</sup> Furthermore, the fall of the Santer Commission in 1999, against a background of allegations of fraud, maladministration and chronic mismanagement, had the effect of firmly placing accountability on the political agenda of EU institutions.

### *E Accountability and Transparency*

Accountability's *alter ego*, transparency, requires decision-makers to give explanations for the decisions they have made. It 'ensures that decisions are taken out of the "backroom"',<sup>41</sup> allowing firmer supervision of the exercise of delegated power and thus resulting in more appropriate decisions and more accountable decision-makers. As such, transparency is considered essential to any democratic polity.<sup>42</sup> Transparency also serves as a crucial tool for understanding the reasons behind governmental action. When a government justifies its decisions it facilitates construction of a reasoned argument by those opposed to the measure.<sup>43</sup> Consequently, transparency is essential for holding a government accountable for its actions. This can happen only when individual citizens are granted access to the relevant information enabling them to monitor the actions of a government.

Also, transparency can only be meaningful when enforcement mechanisms are attached to it.<sup>44</sup> It should not be based on the notion that it can be satisfied simply by allowing citizens to see what is going on within the public institutions, fostering a form of belonging.

Therefore an effective and independent judicial system is also 'a fundamental prerequisite for effective executive accountability'<sup>45</sup> 'No society can be considered

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<sup>39</sup> For a recent summary of this argument with further references, see P. Craig, 'Integration, Democracy and Legitimacy', in P. Craig and G. De Burca, eds, *The Evolution of EU Law*, 2<sup>nd</sup> ed (Oxford University Press, 2011), at 14. Similarly, accountability to the public and the EP must be secured regardless of whether comitology is conceived as a system of intergovernmental bargaining, deliberative supranationalism, or both: see, with further references, J. Blom-Hansen and G Brandsma, 'The EU Comitology System: Intergovernmental Bargaining and Deliberative Supranationalism?', (2009) 47 *Journal of Common Market Studies* 719.

<sup>40</sup> P. Schmitter, *How to Democratize the EU ... And Why Bother?* (Rowman and Littlefield, 2000).

<sup>41</sup> Fisher, *op cit n 3 supra* at 503.

<sup>42</sup> P. Craig, *EU Administrative Law* (Oxford University Press, 2006) at 359.

<sup>43</sup> Fisher, *op cit n 3 supra*.

<sup>44</sup> A. Frost, A. 'Restoring Faith in Government: Transparency Reform in the United States and the EU', (2003) 9 *European Public Law* 87.

<sup>45</sup> Mulgan, *op cit n 18 supra* at 76.



truly democratic if its citizens are denied the possibility of vindicating their legal rights in judicial proceedings, whether against the oppressive acts of a powerful legislature - even a democratically elected one – or against the unlawful practices of an overweening administration'.<sup>46</sup> The EU Courts play a crucial role in public accountability. They contribute to transparency through bringing cases to public attention. It has been noted that:

The fact that the citizens are aware of what the administration is doing is a guarantee that it will operate properly. Supervision by those who confer legitimacy on the public authorities encourages them to be effective in adhering to their [citizens'] initial will and can thereby inspire their confidence, which is a guarantee of public content as well as the proper functioning of the democratic system.<sup>47</sup>

So accountability of the EU can only be properly understood through the lens of the access to documents rules. The public's right to hold decision-makers into account, by assessing the impact of the activities of the EU and by commenting upon those activities, can obviously be exercised if there are rules in place which allow people to access the relevant information. 'After all, without information on what decisions are being taken and by whom, it will not be possible for various accountability forums to hold actors to account'.<sup>48</sup> Transparency and openness enhance awareness and understanding of the ultimate objectives that the decision-making processes aim to achieve.<sup>49</sup> 'Without maximum access to government information, citizens have no way effectively to evaluate and monitor the process by which laws and policies get made and enforced'.<sup>50</sup> In the words of the judiciary, 'the widest possible access to documents ... is essential to enable citizens to carry out genuine and efficient monitoring of the exercise of the powers vested in the [Union] institutions...'.<sup>51</sup> This concept is now set out in the second recital in the preamble of Regulation 1049/2001 on public access to documents held by the EP, the Council and the Commission,<sup>52</sup> which states that 'openness ... guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system'. Consequently, access to documents rules are used to assess the EU's legitimacy and as a means for strengthening accountability.

The application of such rules to the comitology regime was first confirmed by the judgment in *Rothmans*,<sup>53</sup> in which the Court of First Instance, now the General Court, ruled that the 'authorship rule' which applied to the access to documents rules prior to 2001<sup>54</sup> was a restriction on the right of access to documents and so had to be interpreted and applied strictly. Thus, for the purposes of the access rules and by applying the general principle of the widest possible access to documents the Court

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<sup>46</sup> F. Mancini and D. Keeling, 'Democracy and the European Court of Justice', (1994) 57 *Modern Law Review*, 175, 181.

<sup>47</sup> Case C-353/99P, *Hautala v Council* [2001] ECR I-9565, Opinion of Advocate-General Leger, para. 52.

<sup>48</sup> Brandsma *et al.*, *op cit n 2 supra* at 819.

<sup>49</sup> I. Harden, 'Citizenship and Information', (2001) 7 *European Public Law* 165.

<sup>50</sup> S. Kierkegaard, 'Open Access to public documents – More secrecy, less transparency!', (2009) 25 *Computer Law & Society Report* 3, 4.

<sup>51</sup> Case T-92/98, *Interporc v. Commission* [1999] ECR II-3521, para. 39.

<sup>52</sup> Reg 1049/2001, [2001] OJ L145/43.

<sup>53</sup> Case T-188/97, *Rothmans v Commission* [1999] ECR II-2463.

<sup>54</sup> Code of conduct, [1993] OJ L340/41, adopted by Commission Decision 94/90, [1994] OJ L46/58.

of First Instance ruled that comitology committees are part of the Commission and not separate entities. This judgment was confirmed by the 1999 comitology decision.<sup>55</sup>

### III The Pre Lisbon Regime of Comitology Committees: The rationale for their development

#### A Background

From the very beginning (1960), the Council, the only legislator at that time, lacked extensive, detailed knowledge and the technical and scientific expertise required for the implementation of legislative measures. It was also not possible for the Council to agree quickly and efficiently on all the technical requirements needed for every single piece of legislation due to workload limitation.<sup>56</sup> Delegation to the Commission of the non-essential elements of legislation was seen as a solution to mitigate these problems. However, delegation of the principal (in this case the Council) to the agent (in this case the Commission) can only be said to be desirable as long as the principal retains control powers to monitor how the agent is carrying out its delegated tasks.<sup>57</sup> Loss of power by the Council is therefore a sufficient reason to consider delegation as undesirable.<sup>58</sup>

The Council, by definition an intergovernmental institution, feared that delegation would see the supranational Commission acting contrary to the interests of the Member States when exercising its delegated implementing powers. The Council, therefore, wished to exercise effective control over the Commission to limit, as far as possible, the Commission's discretionary powers in the field and ensure that the implementing measures reflected the opinions of the Member States' experts.<sup>59</sup> It was therefore consideration of the Member States' interests via the route of expert advice that led to the birth of the comitology committees. The committees consisted of Member States' representatives with a certain expertise tasked with assisting and controlling the Commission in the exercise of the implementing powers delegated to it by the Council.<sup>60</sup>

Developed by necessity<sup>61</sup> and 'spread like wildfire'<sup>62</sup> the first type of comitology committees came into existence in the areas of the Common Agricultural Policy and

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<sup>55</sup> See further III.C *infra*.

<sup>56</sup> C. Bergstrom, *Delegation of Powers in the European Union and the Committee System* (Oxford University Press, 2005).

<sup>57</sup> Bovens, *op cit* n 25 *supra*.

<sup>58</sup> A. Türk, 'Transparency and comitology', in C. Demmke and C. Engel, *Continuity and Change in the European Integration Process* (European Institute of Public Administration, 2003).

<sup>59</sup> C. Harlow, *Accountability in the European Union* (Oxford University Press, 2002).

<sup>60</sup> Assistance and control are, however, by definition contradictory and the whole idea of helping and controlling may thus be counterintuitive.

<sup>61</sup> It should be noted that the Treaties do not provide for the creation of specific comitology committees (as distinct for the adoption of general rules governing those committees). Each committee is established by secondary legislation on an *ad hoc* basis.

<sup>62</sup> B. Driessen, 'Delegated legislation after the Treaty of Lisbon: An analysis of Article 290 TFEU', (2010) 35 *European Law Review* 837, 838.

Common Commercial Policy, areas where highly detailed and up to date scientific and technical knowledge is needed most.<sup>63</sup>

The comitology system was eventually provided for in Article 145 EEC/EC, as inserted by the Single European Act, and subsequently renumbered Article 202 EC by the Treaty of Amsterdam. Article 202 EC provided that:

The Council shall confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down. The Council may **impose certain requirements** (emphasis added) in respect of the exercise of these powers. The Council may also reserve the right, in specific cases, to exercise directly implementing powers itself. The procedures referred to above must be consonant with principles and rules to be laid down in advance by the Council, acting unanimously on a proposal from the Commission and after obtaining the opinion of the European Parliament.

The general 'principles and rules' referred to were set out initially in a Council Decision of 1987,<sup>64</sup> which was replaced in 1999.<sup>65</sup> The 1999 Decision was amended in 2006.<sup>66</sup> Pursuant to these rules, the Commission has been assisted and simultaneously controlled by the comitology committees. These committees therefore constitute a cardinal tool of EU governance as they are highly involved in the implementation of EU legislation. During 2009, 266 comitology committees met 894 times and voted 2,091 times.<sup>67</sup> The extent, therefore, to which these committees function as a mechanism of oversight on the Commission's work illustrates the pressing need to ensure that they are subject to adequate accountability mechanisms.

### *B Accountability deficits of the Comitology Regime highlighted*

The EU is continually accused of being not accountable enough.<sup>68</sup> This criticism was particularly applied to comitology committees prior to the entry into force of the Treaty of Lisbon.<sup>69</sup>

The development of comitology committees faced severe criticism<sup>70</sup> and led to a number of long-standing inter-institutional tensions. It would go beyond the scope of

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<sup>63</sup> Bergstrom, *op cit* n 56 *supra*.

<sup>64</sup> Council Decision 87/373/EEC, [1987] OJ L197/33.

<sup>65</sup> Council Decision 1999/468/EC, [1999] OJ L184/23.

<sup>66</sup> Council Decision 2006/512/EC, [2006] OJ L200/11. On the development of the comitology rules, see: W. Wessels, 'Comitology: fusion in action. Politico-administrative trends in the EU system', (1998) 5 *Journal of European Public Policy*, 209; C. Joerges and E. Vos, *EU Committees: Social Regulation, Law and Politics* (Hart, 1999); C. Joerges and J. Neyer, 'Transforming Strategic interaction into deliberative problem-solving: European Comitology in the Food stuff sector', (1997) 4 *Journal of European Public Policy*, 609; E. Vos, 'The rise of Committees', (1997) 3 *European Law Journal*, 230; Bergstrom, *op cit* n 56 *supra*; Brandsma, *op cit* n 2 *supra*; and Neuhold, *op cit* n 2 *supra*.

<sup>67</sup> European Commission, 'Report from the Commission on the working of committees during 2009', COM (2010) 354, 2 July 2010.

<sup>68</sup> Fisher, *op cit* n 3 *supra*; Arnull, *op cit* n 38 *supra*; Harlow, *op cit* n 59 *supra*; W. Van Gerven, 'Which Form of Accountable Government for the EU?', (2005) 36 *Netherlands Yearbook of International Law*, 227; Benz *et al.*, *op cit* n 19 *supra*; Lord, *op cit* n 20 *supra*; Bovens, *op cit* n 25 *supra*.

<sup>69</sup> Brandsma, *op cit* n 2 *supra*; Neuhold, *op cit* n 2 *supra*.

this paper to examine in detail the shortcomings of each of the Comitology Decisions. Suffice to say here that the first Comitology Decision in 1987<sup>71</sup> provided with complex procedures (seven in number) that the Commission had to follow before the adoption of the delegated implementing measures. The first Comitology Decision provided no further guidance as to which procedure should apply in each case. More importantly, it granted the Member States through the Council a dominant role and completely ignored the EP, leaving it outside of the established 'control system'. The EP, occupying the opposition side, feared<sup>72</sup> that already adopted legislative measures might be manipulated significantly in the implementation process without its involvement.

The exclusion of the EP from the control mechanisms of the comitology committees when general rules on such mechanisms were first adopted led the EP to bring annulment proceedings before the Court of Justice against the first comitology decision on grounds of alleged accountability deficits.<sup>73</sup> The pressing need for the EP to be on an equal footing with the Council became more obvious post Maastricht with the development of the co-decision procedure which placed the EP on a similar position as the Council and left its control powers relating to implementing measures with no change. The EP considered that the Commission should not possess the power to amend or supplement a legislative act without the assent (tacit or explicit) of the legislator. However, the Court of Justice subsequently implicitly confirmed that the general comitology rules also applied to acts adopted by co-decision.<sup>74</sup>

The EP has consistently fought for increased control powers over the comitology committees, which it saw as a strategy of the Council to devalue the increased legislative powers of the EP. The latter saw comitology as a way to manipulate significantly the implementation of measures already adopted under the (then) co-decision procedure, something which was affecting the accountability of the EP: MEPs could no longer be held accountable if the measures decided by them were significantly changed in the implementation process. In addition, such manipulation was affecting the ability of the EP to hold the executive to account because the implementing measures were *de facto* being taken by the committees.<sup>75</sup>

The pressure from the EP was reflected in the first reform of the Comitology Decision in 1999,<sup>76</sup> which enhanced the position of the EP and also simplified and reduced the comitology procedures from seven to four.<sup>77</sup> This Decision in particular granted the EP the right to be informed of agendas, voting results and draft measures (where the basic act was adopted pursuant to the co-decision procedure), and to view summary

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<sup>70</sup> Türk, *op cit* n 58 *supra*.

<sup>71</sup> Council Decision, *op cit* n 64 *supra*.

<sup>72</sup> M. Alfe, 'Institutional Tensions in the Evolution of the Comitology System', in T. Christiansen, T. J. Oettel and B. Vaccari, *21<sup>st</sup> Century Comitology: The Role of Implementing Committees in the Wider European Union* (European Institute of Public Administration, 2009).

<sup>73</sup> Case 302/87, *EP v Council* [1988] ECR 5615 para. 29; the EP's action was inadmissible.

<sup>74</sup> Case C-259/95, *EP v Council* [1997] ECR I-5303.

<sup>75</sup> Neuhold, *op cit* n 2 *supra*.

<sup>76</sup> Council Decision, *op cit* n 65 *supra*.

<sup>77</sup> The Decision also included new rules on public accountability: see III.C below.

records and attendance lists of the comitology committees.<sup>78</sup> The EP was also given the power to adopt *ultra vires* resolutions indicating that the Commission had exceeded its implementing powers foreseen in the basic act (if that act was adopted by means of the co-decision procedure).<sup>79</sup> This type of soft control is closely related to the principle of the institutional balance provided by the Treaties and is upheld by a consistent line of case law.<sup>80</sup>

According to the management procedure (Article 4) the Commission could adopt the implementing measures which would apply immediately, but if the opinion of the committee was negative (a qualified majority vote (QMV) of the Member States' representatives against the proposal was required to block it) then the Council was entitled to take a different decision within a period of up to three months, which was set by each basic act. The regulatory procedure (Article 5) was based on the idea that the committee needed to approve the draft measure before the Commission could adopt it, thus a QMV of the representatives in favour of the measure was necessary. If the committee blocked a draft measure, it had to be forwarded to the Council, which had the chance to adopt or oppose it by a QMV. If the Council failed to do either within the specified period, then the Commission had to adopt the measure. But the EP had no role in such cases. There was also a safeguard procedure (Article 6), which required the Commission to inform the Member States and the Council of the draft measures. A Member State then could refer the draft decision to the Council, which could control the decision-making of the Commission by blocking or approving it, or taking a different decision by QMV.

The Commission argued for abolishing comitology committees because the management and regulatory committees could prevent it from adopting implementing measures without the committee's approval.<sup>81</sup> It proposed as a replacement 'a simple legal mechanism [which] allows Council and European Parliament as the legislature to monitor and control the actions of the Commission against the principles and political guidelines adopted in the legislation'.<sup>82</sup>

The EP pressed for further reforms, as it still considered that an act adopted under the co-decision procedure (as it was then) which provided for the comitology procedure should provide for control to be exercised by both arms of the legislator equally. Addressing these objections, the 2006 amendments to the Comitology Decision<sup>83</sup> granted more control powers to the EP by introducing the RPS, which reflected its powers as a co-legislator by giving it the power to call back implementing measures. More specifically, the 2006 Decision provides that where the basic act in question was adopted under the co-decision procedure and called for the adoption of a measure of 'general application, designed to amend non-essential elements of that instrument, *inter alia* by deleting some of those elements or by

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<sup>78</sup> Art 7(3), *op cit n 65 supra*. The EP also had to be informed when the Commission proposed measures or proposals to the Council.

<sup>79</sup> Arts 5(5) and 8, *op cit n 65 supra*.

<sup>80</sup> P. Craig, 'Democracy and Rulemaking within the EC: An Empirical and Normative Assessment', (1997) 3 *European Law Journal* 105.

<sup>81</sup> European Commission, 'White Paper on European Governance', COM (2001) 428 at 31.

<sup>82</sup> *Ibid.*

<sup>83</sup> Council Decision, *op cit n 66 supra*.

supplementing the instrument by the addition of new non-essential elements', the new regulatory procedure with scrutiny would apply.<sup>84</sup>

Under this procedure, the Commission must submit a draft measure to a Committee.<sup>85</sup> If the Committee supports the proposal by QMV, then it is forwarded to the Council and the EP and they both have 3 months to decide on adoption of the measure. After the expiry of the 3 month period the Commission can proceed with adoption.<sup>86</sup> Under the RPS the EP and/or the Council has the power to block the draft measure when certain conditions are met: when the draft measure exceeds the implementing powers provided in the basic act; when the draft measure is not compatible with the general aim or the content of the basic act; and finally, when the principles of subsidiarity and proportionality are being violated. If the measure is blocked by either the EP or the Council (or both), the Commission may resubmit an amended draft of the implementing measure to the committee, or present a legislative proposal.

In cases where a committee gave a negative or no opinion, the draft measure is forwarded to the Council.<sup>87</sup> The Council then has three options: to adopt, to oppose or take no action in relation to the measures concerned; it is *not* limited to opposing the measure only on certain substantive grounds. If the Council votes against the measure by QMV, then it cannot be adopted; If the Council decides to adopt the draft measure by QMV, then the measure is forwarded to the EP; if the Council does not act (ie because there is no QMV for or against the measure), then the Commission must forward the draft measure to the EP. In the latter two cases, the EP can then reject the measure by a majority of its members, on the same grounds set out above. Thus, if the Commission does not have the support of the comitology committee, the issue is referred first to the Council but the EP still has the power to block it.

There was also a possibility for an urgent version of the RPS, which provided for the Commission to adopt a measure immediately, with a short period for the Council or EP to veto the measure concerned on the grounds that it was *ultra vires*, *et al.* In that case, the Commission would have to repeal the measure concerned, although it could 'provisionally maintain the measures in force if warranted on health protection, safety or environmental grounds'.<sup>88</sup>

Since the introduction of the RPS in 2006, the Commission examined all the basic acts adopted under the co-decision procedure in order to apply the RPS to the existing *acquis communautaire*. The adaptation process was completed by 2009.<sup>89</sup> In practice, interestingly enough the first veto under the RPS was exercised by the

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<sup>84</sup> Art 2(2) as inserted by the 2006 amendment (*ibid*).

<sup>85</sup> Art 5a(2) as inserted by the 2006 amendment (*ibid*).

<sup>86</sup> Art 5a(3) as inserted by the 2006 amendment (*ibid*). The Council can block the measure by a QMV against, and the EP can block it if a majority of its members votes against.

<sup>87</sup> Art 5a(4), *op cit* n 65 *supra*.

<sup>88</sup> Art 5a(6), *ibid*.

<sup>89</sup> There was an initial list of 25 measures to be amended urgently ([2006] OJ C255/1). The remaining acts were amended by 'omnibus' legislation: Regs 1137/2008 ([2008] OJ L311/1), 1103/2008 ([2008] OJ L304/80), 219/2009 ([2009] OJ L87/109) and 596/2009 ([2009] OJ L188/14). A proposal for a fifth omnibus Regulation (COM (2009)142, 30 Mar 2009) became obsolete due to the entry into force of the Treaty of Lisbon.



Council when it objected to six draft measures that had been agreed by the comitology committees.<sup>90</sup> For its part, the EP has blocked draft measures under the RPS in the areas of financial services<sup>91</sup> and energy labelling.<sup>92</sup> Also, the EP has brought a case against the Council, arguing that one adopted measure is *ultra vires* the basic act.<sup>93</sup>

### *C Lifting the veil of secrecy: Accountability of Comitology procedures to the public*

Apart from the accountability deficits described above resulting from the exclusion of the EP from the control mechanisms of the implementing measures, other than the RPS procedure, comitology committees' meetings were (and still are) taking place behind closed doors. A select committee of the House of Lords reported that these committees were unknown since no list of such committees was 'publicly available, nor is there an authoritative account of what each does'.<sup>94</sup>

Furthermore, prior to 1999 freedom of information rules were simply non-existent as regards comitology committees, something which greatly affected accountability to the general public. However, as noted above, in 1999 the Court of First Instance confirmed that the 1993 rules on access to documents applied to those committees,<sup>95</sup> and the application of the access to documents rules was confirmed by the 1999 Comitology Decision.<sup>96</sup> Therefore the public can have access to all the comitology documents unless any of the exceptions provided in the access to documents Regulation applies.<sup>97</sup> Moreover, since 2000 the Commission publishes an annual report containing information on the number of such committees, their meetings and voting procedures, and since 2001, an online comitology register is also available.<sup>98</sup>

However, empirical research carried out during 2005 indicates that comitology committees are not very transparent in practice. The research findings revealed that 65% of the agendas, 54% of the membership lists, 67% of the summary records and 87% of the voting records were available through the public register. Overall only 5.5% of the draft measures could be accessed.<sup>99</sup>

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<sup>90</sup> One relating the Water Framework Directive [2000] OJ L327/1 and five to the inclusion of active substances under the Biocides Directive (Dir 98/8/EC ([1998] OJ L123/1). See the Commission's report on comitology for the year 2008 (COM (2009) 335, 3 July 2009), 7-8.

<sup>91</sup> The opposing Resolution was adopted in the European Parliament plenary session on 16 Dec 2008 (P6\_TA-PROV(2008)0607). In 2008, the EP and Council between them blocked 7 RPS measures out of 71 (COM (2009) 335, *ibid*).

<sup>92</sup> COM (2010) 354, *op cit* n 67 *supra*, 8-9. In 2009, the EP blocked one RPS measure out of 131, whereas the Council blocked none.

<sup>93</sup> Case C-355/10 *EP v Council*, pending. The EP mustered a majority of the vote against the draft measure, but not the majority of its *members*, as required by the RPS rules.

<sup>94</sup> House of Lords, Select Committee on European Communities, *Delegation of Powers to the Commission: Reforming Comitology*, Third Report, 2 Feb 1999.

<sup>95</sup> *Rothmans*, *op cit* n 53 *supra*.

<sup>96</sup> Art 7(3), *op cit* n 65 *supra*.

<sup>97</sup> *Op cit* n 52 *supra*.

<sup>98</sup> Art 7(4) and (5), *op cit* n 65 *supra*; for the website, see: <http://ec.europa.eu/transparency/regcomitology/index.cfm>.

<sup>99</sup> Brandsma *et. al*, *op cit* n 2 *supra*.

As for judicial review as regards comitology documents, the Court of First Instance (as it was then) ruled in *British American Tobacco*<sup>100</sup> that the applicant's interest in obtaining comitology documents outweighed the Commission's own interest in safeguarding the confidentiality of its proceedings. The latter rule was later replaced by an exception where giving access to documents would 'seriously undermine' a 'decision-making' process, but the Court ruled that if the Commission seeks to rely on this exception as regards comitology documents, it must show that there was a real risk, which was reasonably foreseeable and not hypothetical, that outside pressure would seriously undermine the effectiveness of its discussions; the preparatory or informal nature of its work were not as such grounds to refuse access.<sup>101</sup> Equally, documents concerning the views expressed in the comitology process must be disclosed even despite experts' desire to hide their identities, and even if they concern scientific advice.<sup>102</sup>

## IV The Post Lisbon regime

### A Overview

The Treaty of Lisbon provided for a change to the previous comitology system, entailing the creation of a new type of measure (delegated acts) as well as revising the Treaty framework regarding implementing measures. The relevant provisions are Articles 290 TFEU (delegated acts) and Article 291 TFEU (implementing acts), which provide as follows:

#### *Article 290*

1. A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act.

The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power.

2. Legislative acts shall explicitly lay down the conditions to which the delegation is subject; these conditions may be as follows:

- (a) the European Parliament or the Council may decide to revoke the delegation;
- (b) the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act.

For the purposes of (a) and (b), the European Parliament shall act by a majority of its component members, and the Council by a qualified majority.

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<sup>100</sup> Case T-111/00, *British American Tobacco v. Commission* [2001] ECR II-2997 para. 38.

<sup>101</sup> Case T-144/05, *Muniz v Commission* [2008] ECR II-335.

<sup>102</sup> Cases T-121/05, *Borax v Commission* [2009] ECR II-27\* and T-166/05, *Borax v Commission* [2009] ECR II-28\*.

3. The adjective 'delegated' shall be inserted in the title of delegated acts.

#### *Article 291*

1. Member States shall adopt all measures of national law necessary to implement legally binding Union acts.

2. Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council.

3. For the purposes of paragraph 2, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.

4. The word 'implementing' shall be inserted in the title of implementing acts.

The crucial issue is whether, following the Lisbon Treaty, EU citizens, along with their elected representatives (Members of the EP), the Council and the Member States, taken together, can exercise sufficient *ex ante* and *ex post* control over the delegated and implementing acts entrusted to the Commission (and, where relevant, the Council).<sup>103</sup> The following overview examines in turn the basic features of the post-Lisbon system and addresses some of the key legal issues which arise from it. Then the subsequent sub-sections look in greater detail at the application of the delegated acts procedure in practice and at the implications of the new general rules on implementing measures.

First of all, it should be noted that the power to adopt delegated acts can *only* be conferred on the Commission, whereas it is still possible to confer implementing powers upon the Council in 'duly justified specific cases'.<sup>104</sup>

Secondly, these rules are explicitly (as regards implementing measures) and implicitly (as regards delegated acts) inapplicable to the Common Foreign and Security Policy (CFSP).<sup>105</sup>

Thirdly, the circumstances in which the delegated acts procedure applies are very similar to the circumstances where the regulatory procedure with scrutiny applied under the pre-Lisbon rules, except that the delegated acts procedure can apply as regards the implementation of *any* legislative acts. This means that delegation can take place not only where an act is adopted pursuant to the ordinary legislative procedure (the former co-decision procedure), but also where an act is adopted

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<sup>103</sup> Curtin, *op cit* n 9 *supra*; Mulgan, *op cit* n 4 *supra*.

<sup>104</sup> The words 'duly justified' are new as compared to the previous Art 202 EC. Note also that, as before, the general framework for the control of implementing measures only applies to the *Commission's* adoption of such measures, not the Council's.

<sup>105</sup> The exclusion of CFSP from the scope of Art 290 TFEU is implicit in Art 24(1) TEU, which states that 'legislative acts' cannot be adopted as regards CFSP matters, whereas Art 290 TFEU only applies where 'legislative acts' are adopted (see below).

pursuant to a special legislative procedure.<sup>106</sup> This interpretation follows from the ordinary wording of the Treaty Article,<sup>107</sup> *a fortiori* by comparison with the text of the 2006 amendment to the comitology rules,<sup>108</sup> and *a contrario* by comparison with Article 218(6)(v) TFEU, which makes a distinction between the two types of procedure.<sup>109</sup>

Fourthly, the scope of application of Article 291 is different from the scope of the prior Article 202 EC: the newer provision does not apply to all cases of 'implementation' of measures which the Council adopts, but rather applies where 'uniform conditions for implementing legally binding Union acts' are needed. Unlike Article 290, Article 291 is not restricted to measures implementing *legislative* acts.

Fifthly, Article 290 does not call for the adoption of general rules required for its implementation; instead it provides that the objectives, content, scope and duration of the delegation shall be defined in the legislative act and these conditions will be defined on an ad hoc basis. On the other hand Article 291 calls for the adoption of a general legal framework governing the adoption of implementing acts.

There are several key issues which arise regarding the scope of application of these Articles. First of all, the Commission has rightly argued that these two provisions are mutually exclusive.<sup>110</sup> This follows from the context of Article 290, which deals with cases where the legislators would ordinarily exercise legislative powers, ie where legislative acts are amended or supplemented. It also explains the reference in Article 290 to control by the Council and EP (ie the legislators) as regards delegated acts, as compared to the reference in Article 291 TFEU to control by *Member States* (who similarly normally have the power to adopt measures implementing EU acts, according to Article 291(1)) as regards implementing measures. In the former case, the legislators need to retain control of the (potentially) legislative powers they have delegated to the Commission, including the right to take those powers back when necessary, while in the latter case the Member States have a comparable need for control over measures which interfere with their usual competence over implementing EU law. Presumably, where the power to adopt implementing acts has been conferred exceptionally on the Council, Member States will (as before) control the Council's use of those powers in their capacity as members of the Council.

Secondly, it follows from the first point that *only the Council and EP* can exercise control over delegated acts, while *only Member States* can exercise control over implementing measures. Logically, the body which normally holds the power in

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<sup>106</sup> It should also be noted that the 2006 comitology rules contain further definitions of 'amending' legislative acts ('*inter alia* by deleting some of those elements' and of 'supplementing' those acts ('by the addition of new non-essential elements'). Arguably these definitions are still relevant by analogy when determining the scope of the delegated acts procedure,

<sup>107</sup> Art 289(3) TFEU defines a 'legislative act' as one adopted under *either* a special legislative procedure or the ordinary legislative procedure.

<sup>108</sup> Art 2(2), as inserted by the 2006 amendment, *op cit* n 66 *supra*.

<sup>109</sup> P. Ponzano, "Executive" and "Delegated" acts: the situation after the Lisbon Treaty', in S. Griller and J. Ziller, *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (Springer, 2008), at 135; European Parliament, 'Report on the power of legislative delegation', 5 May 2010 (2010/2021(INI)).

<sup>110</sup> COM (2009) 673, 9 Dec 2009; Driessen, *op cit* n 62 *supra*.

question is the only body which should exercise control over its delegation. This is consistent with the interpretation of these provisions by the institutions in practice.<sup>111</sup> The consequence is that the Commission cannot be controlled by the Member States as regards delegated acts, or by the Council as regards implementing measures. These are significant changes compared to the previous comitology rules, and alter our understanding of accountability as regards these measures.

These fundamental distinctions between Articles 290 and 291, coupled with the mutually exclusive nature of these provisions and the lack of precision as regards their exact scope, means that there are likely to be difficult disputes between the EU institutions on the dividing line between them.<sup>112</sup>

Thirdly, it follows from the first two points, in conjunction with the overlap between the scope of the regulatory procedure with scrutiny and the delegated acts procedure, that acts adopted after the entry into force of the Treaty of Lisbon cannot provide for the former procedure, but only for the latter.<sup>113</sup> On the other hand, the RPS procedure remains valid to the extent that it is provided for in measures adopted before the entry into force of the Treaty of Lisbon, because Article 290 TFEU provides for the delegated acts procedure to apply only when a legislative act expressly provides for that procedure.

Fourthly, as noted already, the delegated acts procedure applies regardless of the legislative procedure used to adopt a basic legislative act, as compared to the RPS system, which only applied where the basic act was adopted by means of the co-decision procedure. So it follows that the delegated acts procedure now applies in many places where the regulatory procedure *without* scrutiny previously applied. In particular, the delegated acts procedure now applies in place of the 'ordinary' procedures in the previous comitology rules where (a) the former co-decision procedure did not apply and (b) the measures to be adopted are of 'general application' and 'supplement or amend certain non-essential elements of [a] legislative act.'

However, as regards the European Parliament, the scope of this change is less dramatic than it first appears, since the scope of the co-decision procedure, now known as the ordinary legislative procedure, was considerably extended by the Treaty of Lisbon, for example to cover areas such as agriculture and fisheries (Article 43(2) TFEU) and the common commercial policy (Article 207 TFEU). So the RPS process would in any event have been extended to such areas, even if the delegated acts procedure had not been invented.

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<sup>111</sup> See IV.B and IV.C below.

<sup>112</sup> See P. Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform* (Oxford University Press, 2010), at 63; P. Craig, 'The Role of the European Parliament under the Lisbon Treaty', in Griller and Ziller, *op cit* n 109 *supra*, at 110; B. de Witte, 'Legal Instruments and Law-Making in the Lisbon Treaty' in Griller and Ziller, *idem* at 79. In practice, there is an ongoing dispute in particular about the application of Art 290 to EU external spending: see Council doc 8311/11, 28 Mar 2011 and COM (2010) 786 to 789, 13 Dec 2010.

<sup>113</sup> It should also be noted that whereas the Council could theoretically have given itself the power to adopt measures within the scope of the RPS procedure, in the unlikely case that the EP had agreed to this, it cannot be given such power to adopt delegated acts.

On the other hand, the delegated acts procedure is wider in scope than the RPS to the extent that the new procedure applies to areas that *still* fall within the scope of special legislative procedures. But, as discussed below, in practice the EP will not be granted control powers over the delegation in such cases.

The new procedure also applies where the Council had previously delegated *to itself* the power to adopt measures which are of 'general application' and 'supplement or amend certain non-essential elements of [a] legislative act'. Again, this change is not as significant as it first appears, since delegation to the Council was the exception under the comitology rules, and in particular, the EP rarely (if ever) accepted the Council's delegation of implementing powers to itself as regards legislation adopted by means of the co-decision procedure.

Having said that, the move to the delegated acts procedure fundamentally alters the control powers of *Member States*, both *de jure* and *de facto*. As noted already, Member States have lost all *de jure* power as compared to the previous rules, since they cannot as such control delegated acts. They have also lost considerable *de facto* power, since the usual requirement under the previous rules that such measures had to be *supported* by a QMV of Member States' representatives in a comitology committee has gone, leaving only the power of the Council, made up of Member States' representatives, to *block* a proposed delegated act by QMV.

Fifthly, it is necessary, in order to ensure that legislative acts are not amended without control of the legislature, to amend all relevant pre-Lisbon measures so that the new rules can apply. To this end, the Commission has stated that all pre-Lisbon legislation providing for the RPS will be converted to the delegated acts procedure by the end of the current EP term (June 2014).<sup>114</sup> Furthermore, the Commission also provided an indicative calendar listing its planned proposals to convert other pre-Lisbon legislative measures which provide for the adoption of implementing measures to the delegated acts procedure.<sup>115</sup> A number of these proposals have already been submitted,<sup>116</sup> including a proposal regarding the common commercial policy that would bring most legislation in this area within the scope of the general rules on implementing acts for the first time, removing the Council's powers to adopt trade defence measures or to overrule the Commission, and leaving such powers with the Commission only.<sup>117</sup>

For the time being, the pre-Lisbon comitology provisions have been converted to the regime of the new Implementing Acts Regulation, except for those cases where the regulatory procedure with scrutiny applies;<sup>118</sup> in those cases, RPS will apply until it is replaced by the delegated acts procedure.<sup>119</sup> To the extent that the procedures concerned now fall within the scope of the delegated acts rules, this is surely illegal,

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<sup>114</sup> See the Commission's statement, [2011] OJ L55/19.

<sup>115</sup> See Council doc 18097/10, 22 Dec 2010, which lists 153 such measures. The Commission plans to table most of these proposals by mid-2012.

<sup>116</sup> For instance, see: COM (2010) 738 final, 10 Dec 2010; COM (2010) 733 final, 10 Dec 2010; and COM (2010) 728 final, 9 Dec 2010.

<sup>117</sup> COM (2011) 82, 7 Mar 2011.

<sup>118</sup> Art 13, *op cit* n 1 *supra*.

<sup>119</sup> Art 12, *ibid*.



because, for the reasons discussed above, legislation adopted after the entry into force of the Treaty of Lisbon *must* provide for the adoption of delegated acts, not implementing acts, where the acts concerned fall within the scope of Article 290.

Next, an important question as regards Article 290 TFEU is whether the possibilities for control of the Commission listed in that Article are exhaustive or not.<sup>120</sup> On this point, when the Treaty states that the power to adopt delegated acts '*may*' be conferred on the Commission, it presumably means, in light of the general context of Article 290 (as discussed above), that the legislators have an option to confer this power upon the Commission; they could instead have fully retained the power to adopt such measures themselves pursuant to the legislative procedure. Next, the Treaty *requires* ('shall') the objectives, *et al* of the delegation to be specified, and equally rules out the delegation of essential elements of the legislation. The legislation '*shall*' lay down the conditions to which the delegation is subject, but these conditions '*may*' be revocation or prior control before adoption of a delegated act.

The obvious meaning of the word '*may*', as contrasted with the word '*shall*' in the same Article, is that the two types of control referred to expressly in Article 290(2) are *not* the only types of control which the legislators can impose. This also follows from the context of Article 290: since the legislators decide whether or not to delegate their legislative power, it must follow that they have the power to decide on the conditions which apply when they delegate it, provided that the conditions are explicit and that the limits in Article 290(1) (and the basic distinction between Articles 290 and 291, ie control can only be exercised by the EP and/or the Council) are complied with. It might even be argued that the final sentence of Article 290(2), which provides that the EP and Council '*shall*' apply particular voting rules, need not always apply either, since that sentence refers back to provisions which are themselves only options.

This discussion is relevant because the EP and Council might well wish to develop other forms of control besides those listed in Article 290(2). In particular, the Council has already adopted a Regulation pursuant to a special legislative procedure which provides powers of control over delegated acts only for itself, and not for the EP.<sup>121</sup> This could only legally be justified if the list of control mechanisms in Article 290(2) is non-exhaustive, and in that case it must follow that other types of alternative control mechanisms are possible too. From the point of view of accountability, limiting control powers to the Council is acceptable where the Council alone is conferring the power on the Commission, but arguably, since Article 290(2) is non-exhaustive, it remains an option: the Council might equally chose to share that power jointly with the EP if it wishes. The latter argument is stronger where the EP has the power of consent as regards Council legislation adopted by means of a special legislative procedure.

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<sup>120</sup> See Commission doc. COM (2009) 673, *op cit* n 110 *supra*, and EP resolution, *op cit* n 109 *supra*; Craig, *op cit* n 112 *supra*; Driessen, *op cit* n 62 *supra*; D. Curtin, *Executive Power of the European Union: Law, Practices, and the Living Constitution* (Oxford University Press, 2009) at 123.

<sup>121</sup> Reg 973/2010, [2010] OJ L285/4, Arts 6-10. There are further proposals to this end: see, for instance, the proposal for a Common Consolidated Tax Base (COM (2011) 121, 16 Mar 2011), Arts 127-130.

Finally, the relevance of the pre-Lisbon case law concerning the conferral of implementing powers must be re-assessed in light of the new regime established by the Treaty of Lisbon. Presumably, after that Treaty, it is *a fortiori* still impermissible for the Council to confer secondary legislative powers upon itself to amend legislation; it can only confer power on itself to adopt implementing acts if the conditions to do so are met (subject now to its inability to confer powers on itself to the extent that Article 290 applies) or use the relevant legislative procedure.<sup>122</sup> If the Council had the power to confer such powers upon itself, it would subvert the intent of the Treaty drafters as regards both Article 290 (delegated power conferred on the Commission only, subject to control by the legislators) and Article 291 (implementing power conferred on the Commission, subject to control by the Member States, or conferred on the Council only as a 'duly justified' exception).

As for the case law regarding the extent of the Council's power to confer implementing powers on itself,<sup>123</sup> it is *prima facie* still valid,<sup>124</sup> with the *caveat* that, for the reasons explained above, the Council cannot now confer any powers falling within the scope of Article 290 upon itself.

On the other hand, the prior case law on the choice of committee procedure in the context of comitology focused on the choice between the management procedure and the regulatory procedure.<sup>125</sup> Since those procedures have been merged into a new 'examination procedure', this case law is not relevant as such, except perhaps to the extent that it sheds light on the definition of measures of 'general scope'. Furthermore, that case law is not relevant by analogy to the choice in the new Implementing Acts Regulation as to whether to require the Member States' representatives to vote by QMV to approve the possible adoption of an implementing act by the Commission. Although this choice resembles the choice between the management and the regulatory procedure, the Implementing Acts Regulation, unlike the prior comitology decision, does not set out any criteria regarding this choice, and so the use of either option is purely a matter of political discretion.<sup>126</sup>

It is also doubtful whether the prior case law on the choice of committee procedure is relevant by analogy as regards the choice between the advisory procedure and the examination procedure in the Implementing Acts Regulation, given that the prior comitology Decision used the words 'should' and 'guided by' as regards the choice of procedure, and stated expressly in the preamble that the criteria were 'non-binding', whereas the Implementing Acts Regulation states that each type of procedure

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<sup>122</sup> See Case C-133/06, *EP v Council* [2008] ECR I-3189. On this issue, see H. Hofmann, 'Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets Reality', (2009) 15 *European Law Journal* 482 at 495-496.

<sup>123</sup> See particularly Cases 16/88, *Commission v Council* [1989] ECR 3457 and C-257/01, *Commission v Council* [2005] ECR I-345.

<sup>124</sup> Although the words 'duly justified' have been added to Art 291 TFEU, it is doubtful that they add anything to the prior case law on this issue: see Case C-257/01 (*ibid*), paras. 50 and 51. However, see the view of the Advocate-General in that case (at n 35) that the wording of the Draft Constitutional Treaty (which is identical to Art 291 TFEU on this point) is 'a little more specific'.

<sup>125</sup> Cases C-378/00, *Commission v EP and Council* [2003] ECR I-937, C-122/04, *Commission v EP and Council* [2006] ECR I-2001 and C-443/05, *P Common Market Fertilizers v Commission* [2007] ECR I-209.

<sup>126</sup> See further IV.C below.

‘applies’ in certain cases, but permits the advisory procedure to be applied in ‘duly justified cases’.<sup>127</sup> The words ‘duly justified’ suggest rather that the prior case law on conferring implementing powers on the *Council* should apply by analogy.

As to the dividing line between Articles 290 and 291 TFEU, there is no case law to date on the distinction between measures covered by RPS and measures subject to other forms of comitology procedure.<sup>128</sup> Given the similarity between the scope of RPS and the scope of Article 290 TFEU, any future case law on the RPS/regulatory procedure distinction would be relevant to the Article 290/291 distinction – and vice versa.

It must be presumed that Article 291, in accordance with prior case law, still permits implementing powers to be conferred only as regards non-essential elements of the basic acts. This rule appears expressly in Article 290. Logically, the obligation to set out the essential elements in the basic acts must be interpreted the same way as regards Articles 290 and 291, and there is no reason to doubt that the prior case law of the Court of Justice remains relevant on this point.<sup>129</sup> Similarly, the prior case law on the illegality of *ultra vires* implementing acts of the Commission or Council should also be applicable by analogy to measures adopted in the post-Lisbon framework, taking account of the specific powers conferred by each basic act.<sup>130</sup>

Equally, the case law relating to the observance of procedural requirements as regards comitology committees is applicable *mutatis mutandis* to the procedural rules established by the Implementing Acts Regulation, and (with greater degrees of adaptation) to the control procedures established as regard delegated acts.<sup>131</sup>

Finally, the concept of ‘implementation’ for the purpose of Article 291 must necessarily be narrower than the broad concept of implementation as regards the previous Article 202 EC,<sup>132</sup> for the obvious reason that, as already discussed, the measures now known as delegated acts within the scope of Article 290 previously fell within the scope of the prior Article 202 EC as implementing measures, but now Articles 290 and 291 are mutually exclusive.

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<sup>127</sup> Art 2(2) and (3), *op cit* n 1 *supra*. However, note the word ‘should’ in points 11 and 15 of the preamble.

<sup>128</sup> However, the case law on the definition of ‘general scope’ (*op cit* n 125 *supra*) might be *partly* relevant by analogy.

<sup>129</sup> See Cases C-156/93, *EP v Commission* [1995] ECR I-2019 and C-417/93, *EP v Council* [1995] ECR I-1185.

<sup>130</sup> See, for instance, Cases: C-296/93 and C-307/93, *France and Ireland v Commission* [1996] ECR I-795; C-303/94, *EP v Council* [1996] ECR I-2943; C-159/96, *Portugal v Commission* [1998] ECR I-7379; C-93/00, *EP v Council* [2001] ECR I-10119; C-403/05, *EP v Commission* [2007] ECR I-9045; C-14/06 and C-295/06, *EP v Commission* [2008] ECR I-1649; and C-355/10, *EP v Council*, pending.

<sup>131</sup> See Case C-263/95, *Germany v Commission* [1998] ECR I-441 and Joined Cases C-465/02 and C-466/02, *Germany and Denmark v Commission* [2005] ECR I-9115. As regards the advisory procedure, see Case C-86/03, *Greece v Commission* [2005] ECR I-10979.

<sup>132</sup> Case 16/88, *op cit* n 123 *supra*; *Commission v Council* [1989] ECR 3457, para. 11; Case C-25/70, *Einfuhr und Vorratsstelle Getreide v Koster* [1970] ECR 1161; Case C-240/90, *Germany v Commission* [1992] ECR I-5383; see also the discussion of the extensive prior case law in Hofmann, *op cit* n 122 *supra* at 490-491 and Driessen, *op cit* n 62 *supra* at 846-847.

It has been suggested that Article 291 is also narrower than the prior Article 202 EC in that the former Article can only apply where ‘uniform conditions for implementing legally binding Union acts are needed,’ whereas no such condition previously applied. In particular, it has been argued that unlike Article 202 EC, Article 291 cannot be used to adopt individual decisions, and potentially could not be used as regards measures implementing Directives or Regulations.<sup>133</sup> However, as can be seen from the case law of the Court of Justice, it is indeed possible, particularly in the context of market regulation, that an implementing measure concerning (for instance) the marketing, restriction or prohibition of an individual substance or product can constitute a ‘uniform condition’ for implementing EU law;<sup>134</sup> it should not matter whether the basic act is a Directive or a Regulation in that case.<sup>135</sup> This interpretation is confirmed by the overall legal context: since the limitation to measures of ‘general scope’ appears in Article 290 but not Article 291, it follows a *contrario* that Article 291 can cover individual measures, provided that the ‘uniform conditions’ criterion is satisfied. The inclusion of individual acts within the scope of the Implementing Acts Regulation is therefore valid.<sup>136</sup>

### *B Delegated Acts (Article 290 TFEU)*



The Treaty of Lisbon, contrary to the prior situation under the EC Treaty, introduced a hierarchy of legal norms. By doing so, the Treaty made a distinction between legislative and non-legislative acts. Before the entry into force of the Treaty of Lisbon, it was a very difficult and time consuming task, especially for the general public, to ascertain whether regulations, directives and decisions came from the EU legislative or executive power; this reflected the overall lack of transparency of EU decision-making. The EU’s legal order has now been clarified with the introduction of a hierarchy of legal norms and citizens can now easily, in principle, differentiate between legislative and non-legislative acts. In the interests of transparency, Articles 290(3) and 291(4) TFEU provide respectively that the adjectives ‘delegated’ and ‘implementing’ shall be inserted in the title of the acts. Unfortunately, the Commission has frequently failed to indicate since the Treaty of Lisbon in the titles of its acts under which category the act falls, even following the entry into force of the

<sup>133</sup> See Craig, *op cit* n 112 *supra*, at 120.

<sup>134</sup> See Case C-359/92, *Germany v Council* [1994] ECR I-3681, para 37: ‘[i]n certain fields, and particularly in that of product safety, the approximation of general laws alone may not be sufficient to ensure the unity of the market.’ See also Case C-66/04, *UK v Parliament and Council* [2005] ECR I-10553.

<sup>135</sup> See Case C-359/92, *Germany v Council* [1994] ECR I-3681, para 37: ‘[i]n certain fields, and particularly in that of product safety, the approximation of general laws alone may not be sufficient to ensure the unity of the market.’ See also Case C-66/04, *UK v Parliament and Council* [2005] ECR I-10553.

<sup>136</sup> See Art 2(2), *op cit* n 1 *supra*, which refers to ‘implementing acts of general scope’ as distinct from ‘other implementing acts’.

Implementing Acts Regulation.<sup>137</sup> Such instances are very disappointing, especially from a transparency perspective, since they ignore significant achievements made by the Lisbon Treaty.

The EP's power to block delegated acts is not new as such,<sup>138</sup> since it had the power to block the adoption of implementing measures pursuant to the RPS rules. However, as compared to the RPS, Article 290 TFEU grants control powers jointly to both arms of the EU legislator; so '[t]he EP has achieved its historical maturity being placed on the same footing as Council'.<sup>139</sup> As noted above, while the EP and the Council were in many respects in an equal position as regards the RPS, this was not the case where the adoption of a draft measure was blocked by a committee, since in that case the Council had a first possibility to decide if it wished to adopt or reject the draft measure, and if it wished to reject that draft measure, it could do so on any grounds – whereas the EP was still limited to certain grounds of rejection. Under the delegated acts procedure, such a distinction cannot arise, since there are no committees with powers to block draft delegated acts in the first place. The EP's historic concerns about the EU's democratic deficit, which were obviously connected with the limited parliamentary influence over comitology measures as compared to the Council's dominant role, seem now to be alleviated. This is impressive, at least in theory. However, as noted above, under the special legislative procedure the EP is *not* in an equal position with the Council as regards delegated acts.

More broadly, the Council and the EP each have more power than under the RPS procedure in that they are not now limited to blocking the draft measure only on specified grounds, and can exercise *ex post* control simply '... should the measure not be to the liking of the EP or the Council',<sup>140</sup> although the possible grounds for blocking a measure under the RPS were in principle quite broad. Also, for the first time, either legislator may revoke the powers of delegation granted to the Commission. However, the power to revoke a delegation of power is not as fundamentally important as it might appear,<sup>141</sup> since in the absence of this power, it would always be open to the EP or the Council to reject every proposed delegated act submitted by the Commission as regards some (or all) legislative acts. It would equally be possible for one or both of the EP and the Council to reject all draft implementing measures pursuant to the RPS procedure, except that one or both arms of the legislator would have to justify its rejection in each case on the grounds set out in the previous comitology decision.

The bigger difference between the RPS and the delegated acts procedure is, as discussed already, the abolition of the formal powers of comitology committees.

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<sup>137</sup> For recent examples, see Commission Implementing Reg 297/2011 ([2011] OJ L80/5) and, on the other hand, Commission Decision on the approval of national measures for preventing the introduction of ostreid herpesvirus 1  $\mu$ var (OsHV-1  $\mu$ var) into certain areas of Ireland and the UK ([2011] OJ L80/15).

<sup>138</sup> See the contrary view of P. Craig, *op cit n 112 supra*, at 115 stating that the EP has gained an 'important power...that it did not have hitherto'.

<sup>139</sup> European Parliament Press Release available at: <http://www.europarl.europa.eu/sides/getDoc.do?language=EN&type=IM-PRESS&reference=20100406STO72095>.

<sup>140</sup> Craig, *op cit n 112 supra* at 116.

<sup>141</sup> Ponzano, *op cit n 109 supra*.

Also, the rules for adopting delegated acts are now agreed on a case-by-case basis, rather than pursuant to the basic framework for implementing measures, which is now set by the EP and the Council acting together under the ordinary legislative procedure, and was previously decided by means of unanimity in the Council with consultation of the EP.

The implications of the new procedure can only be fully understood in light of the institutional practice to date, as regards conferring the power to adopt delegated acts and as regards the Commission's use of that power. Shortly after the Treaty of Lisbon entered into force, the Commission and the EP stated general positions as regards the interpretation of Article 290.<sup>142</sup> In particular, the Commission argued that the legislators did not have to use both of the control mechanisms listed in Article 290(2) and should normally grant an indefinite delegation, with a maximum three-month period for review of draft delegated acts (a two-month period with a possible one-month extension). It also suggested model clauses regarding delegated acts for adoption by the legislature, including a provision for a possible urgency procedure. For its part, the EP took the view that the mechanisms of control listed in Article 290 were not exhaustive, and could for instance also include a requirement of a positive vote in favour by the EP or the Council before a delegated act could be adopted, or the power to revoke delegated acts after adoption.

To date, the EU institutions have not agreed standard rules on use of the delegated acts procedure, although it is understood that a 'common understanding' on this issue is under negotiation.<sup>143</sup> So for now, it is necessary to examine each individual legislative act. First of all, one Regulation adopted pursuant to a special legislative procedure has conferred the power to adopt delegated acts on the Commission; this measure is discussed separately below. Secondly, 27 legislative acts adopted pursuant to the ordinary legislative procedure have conferred such powers.<sup>144</sup> The relevant provisions in the first such measure, a Regulation amending existing EU legislation on the movement of pets,<sup>145</sup> are similar to the model clauses suggested by the Commission, and have in practice been used as a template for all subsequent measures. These provisions are as follows:

#### Article 19b

1. The power to adopt the delegated acts referred to in Article 5(1) and Article 19a shall be conferred on the Commission for a period of 5 years following 18 June 2010. The Commission shall make a report in respect of the delegated powers not later than 6 months before the end of the 5 year period. The delegation of powers shall be automatically extended for periods of an identical duration, unless the European Parliament or the Council revokes it in accordance with Article 19c.

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<sup>142</sup> Respectively COM (2009) 673, *op cit* n 110 *supra*, and resolution of 5 May 2010, *op cit* n 109 *supra*.

<sup>143</sup> For instance, see the draft Garcia-Perez report of 25 Mar 2011, on the proposal to amend Council Reg 1234/2007 as regards marketing standards.

<sup>144</sup> The following summary takes account of all adopted legislative acts listed in the Council's register of documents which refer to 'Article 290', as of 4 April 2011. It does not take account of legislative acts which have not yet been formally adopted, even where the legislation has been agreed in principle.

<sup>145</sup> Reg 438/2010, [2010] OJ L132/3.



2. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

3. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in Articles 19c and 19d.

#### Article 19c

1. The delegation of powers referred to in Article 5(1) and Article 19a may be revoked at any time by the European Parliament or by the Council.

2. The institution which has commenced an internal procedure for deciding whether to revoke the delegation of powers shall endeavour to inform the other institution and the Commission within a reasonable time before the final decision is taken, indicating the delegated powers which could be subject to revocation and possible reasons for a revocation.

3. The decision of revocation shall put an end to the delegation of the powers specified in that decision. It shall take effect immediately or at a later date specified therein. It shall not affect the validity of the delegated acts already in force. It shall be published in the Official Journal of the European Union.

#### Article 19d

1. The European Parliament or the Council may object to a delegated act within a period of two months from the date of notification.

At the initiative of the European Parliament or the Council this period shall be extended by two months.

2. If, on expiry of that period, neither the European Parliament nor the Council has objected to the delegated act, it shall be published in the Official Journal of the European Union and shall enter into force on the date stated therein.

The delegated act may be published in the Official Journal of the European Union and enter into force before the expiry of that period if the European Parliament and the Council have both informed the Commission of their intention not to raise objections.

3. If the European Parliament or the Council objects to a delegated act, it shall not enter into force. The institution which objects shall state the reasons for objecting to the delegated act.

There have been variations upon the first standard provision (as regards the time periods for review of the delegation) and upon the third standard provision (as regards the time period to object to the draft delegated acts), but there has been no variation to date as regards the second standard provision (the possibility of revoking the delegation).

In particular:

a) EU financial legislation (consisting of six adopted measures) consistently provides for a (renewable) four-year delegation of power to the Commission,

and a period of three months (which can be extended for a further three months) to review the draft acts concerned;<sup>146</sup>

b) two measures provide for an *indefinite* delegation of power to the Commission,<sup>147</sup> although of course this delegation remains subject to possible revocation;

c) three measures provide for termination of the delegation (as regards one type of delegation) by a fixed date;<sup>148</sup>

d) two measures provide for longer renewable delegation periods;<sup>149</sup>

e) one measure provides for a shorter renewable delegation period;<sup>150</sup> and

f) one measure provides for a three month period (which can be extended for a further three months) to review the draft acts concerned.<sup>151</sup>

In four financial services measures,<sup>152</sup> there is a special rule providing for a detailed procedure for draft delegated acts to be drawn up in the first place by a specialised agency. If the Commission agrees with such draft acts, there is only a one-month period for the EP and Council to review them, with a possible one-month extension. Furthermore, in one case to date, the legislative act has included an urgency clause, which reads as follows:<sup>153</sup>

1. Delegated acts adopted under the urgency procedure shall enter into force without delay and apply as long as no objection is expressed in accordance with paragraph 2. The notification of the act to the European Parliament and to the Council shall state the reasons for the use of the urgency procedure.

2. The European Parliament or the Council may object to a delegated act in accordance with the procedure referred to in Article 27(1). In such a case, the act shall

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<sup>146</sup> Dir 2010/73 amending the prospectus and transparency Directives ([2010] OJ L327/1); Dir 2010/76 on capital requirements and supervisory review of remuneration policies ([2010] OJ L329/3); Dir 2010/78 amending EU financial legislation as regards the European Supervisory Authority ([2010] OJ L331/120); Reg 1093/2010 establishing a European Banking Authority ([2010] OJ L331/12); Reg 1094/2010 establishing a European Insurance and Occupational Pensions Authority ([2010] OJ L331/48); and Reg 1095/2010 establishing a European Securities and Markets Authority ([2010] OJ L331/84). However, there is a special rule in the latter four measures as regards the period to review draft delegated acts: see the discussion below.

<sup>147</sup> Art 36 of Dir 2010/35 on transportable pressure equipment ([2010] OJ L165/1), and Art 17(1) of Reg 211/2011 on the European citizens' initiative ([2011] OJ L65/1).

<sup>148</sup> Art 23(2) of Dir 2010/31 on the energy performance of buildings ([2010] L153/13), which provides for the powers conferred as regards Art 5 of the Directive to expire on 30 June 2012; Art 12(1) of Dir 2010/40 on intelligent transport systems ([2010] OJ L207/1), confers power for a fixed period of seven years; and Art 10(1) of Reg 911/2010 on the European Earth monitoring programme ([2010] OJ L276/1) confers powers only until the end of 2013.

<sup>149</sup> Art 51(1) of Dir 2010/63 on the protection of animals used for scientific purposes ([2010] OJ L276/33) provides for an eight-year period. The report on the delegation is due one year before the end of that period. Art 15(1) of Reg 995/2010 on the obligations of operators who place timber and timber products on the market ([2010] OJ L295/23) provides for a seven-year period, with a report due three months before the end of three years after the date of application of the Regulation.

<sup>150</sup> Reg 1246/2010 concerning aspects of fisheries control and enforcement ([2010] OJ L348/17), which provides for a three-year period.

<sup>151</sup> The Reg laying down harmonised conditions for the marketing of construction products (Council doc PE-5/11, 21 Feb 2011).

<sup>152</sup> See *op cit* n 146 *supra*.

<sup>153</sup> Art 28 of Dir 2010/45 on standards of quality and safety of human organs intended for transplantation ([2010] OJ L207/14).

cease to be applicable. The institution which objects shall state the reasons for objecting to the delegated act.

This clause was accompanied by the following Commission statement:

The European Commission undertakes to keep the European Parliament and the Council fully informed on the possibility of a delegated act being adopted under the urgency procedure. As soon as the Commission's services foresee that a delegated act might be adopted under the urgency procedure, they will informally warn the secretariats of the European Parliament and of the Council.

Compared to the urgency procedure provided for under the RPS,<sup>154</sup> there is of course no prior scrutiny by a committee of Member States' representatives and no restriction of the grounds for objecting to the act; also, there is no special time limit of one month for review by the legislators and no possibility for the Commission to keep the act in force despite their objections.

On the other hand, ten legislative acts to date have provided for the standard delegation clauses with no variation.<sup>155</sup> Each legislative act has also referred in the preamble to the importance of Commission consultations, 'including at expert level', when preparing draft delegated acts;<sup>156</sup> the Commission has also frequently released statements promising to take into account the winter, summer and election recesses of the other institutions when the latter exercise their prerogatives.

In spite of the Commission's suggestions, the legislature has never to date waived the possibility of subjecting the Commission to both forms of control listed in Article 290(2); but in spite of the EP's view, nor has the legislature yet subjected the Commission to forms of control *not* listed in Article 290(2). The time periods for review of draft acts are generally longer than the Commission wanted,<sup>157</sup> and the grant of delegated powers for indefinite periods is quite rare, contrary to the Commission's wishes. But it should be noted that where the Commission has to report on the delegation of power, it will apparently only have to produce one such report, on the occasion of the first renewal of the delegation.

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<sup>154</sup> Art 5a(6), as inserted by the 2006 amendments (*op cit* n 66 *supra*).

<sup>155</sup> In particular: Dir 2010/30 on energy-labelling ([2010] OJ L153/1); Reg 640/2010 establishing a catch documentation programme for bluefin tuna ([2010] OJ L194/1); Dir 2010/65 on reporting formalities for ships ([2010] OJ L283/1); Dir 2010/75 on industrial emissions (integrated pollution prevention and control) ([2010] OJ L334/17); Reg 1090/2010 on statistical returns in respect of carriage of goods and passengers by sea ([2010] OJ L 325/1); Dir 2010/84 on pharmacovigilance ([2010] OJ L348/74); Reg 1235/2010 on pharmacovigilance ([2010] OJ L348/1); the Reg amending Council Reg 708/2007 concerning use of alien and locally absent species in aquaculture (Council doc 61/1/10, 14 Feb 2010) the Dir on patients' rights in cross-border healthcare (Council doc PE-6/11, 21 Feb 2011); and the Reg on emission performance standards for new light commercial vehicles (Council doc PE-CONS 4/11, 16 Mar 2011). However, note that Art 10 of Dir 2010/30 contains particularly detailed criteria regulating the adoption of delegated acts.

<sup>156</sup> The preambles to the financial services measures make this point in more detail, referring *inter alia* to the relevant declaration (no 39) on this point in the Final Act of the Treaty of Lisbon.

<sup>157</sup> As regards the urgency procedure, the Commission had suggested a shorter period of six weeks to review the adopted act, but the Council and EP insisted on the normal review period in Dir 2010/45 (*op cit* n 153 *supra*).

As for the sole act to date adopted pursuant to a special legislative procedure that provided for a delegated acts procedure,<sup>158</sup> the relevant rules follow the standard template set out above, except that powers are conferred on the Commission for an indeterminate period, there is a single period of three months to object to the delegated act and most fundamentally, only the Council can exercise the objection and revocation powers. The EP only has the right to be informed of the adoption of delegated acts, and of objections and revocations by the Council; it is not even accorded the right to make a non-binding objection.

In practice, the Commission has adopted four delegated acts to date, all of which concern energy labelling for household products.<sup>159</sup> All were approved by the EP and Council. When drawing up its proposals, the Commission consulted Member States' experts and stakeholders widely, and took considerable account of the comments and objections expressed.<sup>160</sup>

Is the delegated acts procedure sufficiently accountable to the Council and the EP? First of all, it is not objectionable to confer an indeterminate delegation of power to the Commission, as long as the legislators can hold the Commission accountable by choosing at any time to revoke that delegation and/or block all individual delegated acts. It might also be argued that it is a waste of the Commission's time to produce a large number of reports on the exercise of the power of delegation in respect of some (but not all) individual legislative acts; a single comprehensive annual report on the exercise of all the delegated powers should be sufficient to inform the legislators.

As for the process of ensuring accountability for specific delegated acts, both the Council and the EP have lost the flow of detailed information that was previously generated in the context of comitology committees, and which was necessary to ensure effective control of the Commission's powers. Craig has moreover argued that the removal of comitology committees will have the effect of depriving the Commission of the expertise required to regulate highly complicated issues.<sup>161</sup>

In practice, the Commission's communication on the delegated acts procedure promised to consult national experts systematically, and to 'conduct any research, analysis, hearings and consultations required' on draft delegated acts.<sup>162</sup> As we have seen, the legislation providing for the delegated acts procedure refers consistently to the consultation of experts, and the Commission took account of expert views and the views of wider stakeholders as regards its first delegated acts. It follows that, with the replacement of comitology committees and the generalisation of the use of expert groups as regards the delegated acts procedure, the latter groups are now crucial as conduits of expertise for the Commission and (indirectly) as sources of information for the EP and the Council, when holding the Commission accountable. The same applies as regards the accountability of the delegated acts

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<sup>158</sup> Arts 6-10, *op cit* n 121 *supra*.

<sup>159</sup> Commission Delegated Regs 1059-1062/2010, [2010] OJ L314/1, 17, 47 and 64.

<sup>160</sup> See the proposals for the delegated acts, in Council docs 14246/10, 14251/10, 14253/10 and 14256/10, all 29 Sep 2010.

<sup>161</sup> Craig, *op cit* n 112 *supra* at 117-118.

<sup>162</sup> COM (2009) 673, *op cit* n 110 *supra* at 6-7.

procedure to the public – although the Commission made no mention of this issue in its communication.

We must therefore necessarily now turn to the framework for the accountability of these expert groups. Expert groups have been defined as ‘a committee or group set up by and terminated by the Commission of its own accord or a committee/group that is regarded to be the Commission’s expert group although not financed, chaired or set up by the Commission’.<sup>163</sup> They consist of ‘... national and/or private-sector experts who assist the Commission in exercising its powers of initiative and in its tasks of monitoring and coordination or cooperation with the Member States’.<sup>164</sup>

Legally, expert groups constitute a forum for discussion and advice acting under the supervision of the Commission.<sup>165</sup> Expert groups, as compared to Council working groups and the pre-Lisbon comitology committees, have more discretion in the relevant policy field in the sense that they do not represent anyone and they do not attend any meetings with a mandate on how to act.<sup>166</sup> This is because the members of the groups are expected to behave independently, guided by their scientific knowledge and expertise. They do not vote in any formal sense.

These groups play a significant role in the EU decision-making process, ‘... outnumbering by far other types of committees in the EU system’.<sup>167</sup> Acting behind the scenes, right after the Commission decides to regulate an area, an expert group is created to assist with the drafting of the text. Although they only have an advisory role, expert groups contribute to the drafting of EU measures by providing the essential scientific knowledge and expertise required for preparing the Commission’s proposals.

Accountability deficits in the field of the expert groups exist due to the lack of transparency regarding their exact number, composition and meetings. ‘[T]here is no official list of who participates in what expert group, what time perspective a group has, or what kind of budget has been allocated’.<sup>168</sup> According to Dehousse, ‘[w]ho can say with exactitude the number of committees of experts in existence at the European level? Who can vaunt their knowledge of the rules which govern their composition and mode of functioning? At best, a handful of people’.<sup>169</sup> Disappointingly, not even the Commission has adequate knowledge of the scale and activities of the expert groups.<sup>170</sup> Limited transparency of the expert groups

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<sup>163</sup> T. Larsson, *Precooking in the European Union-The World of Expert Groups* (Fritzes Offentliga Publikationer, 2003) at 14.

<sup>164</sup> COM (2005) 2817, 27 July 2005 at 2.

<sup>165</sup> A. Gornitzka and U. Sverdrup, ‘Who Consults? The Configuration of Expert Groups in the European Union’, (2008) 31 *West European Politics*, 725.

<sup>166</sup> E. Morten, S. Gunther and J. Trondal, ‘The Many Faces of EU committee governance’, (2003) 26 *West European Politics* 19, 20.

<sup>167</sup> Gornitzka, *op cit n 165 supra*.

<sup>168</sup> Larsson, *op cit n 163 supra* at 15.

<sup>169</sup> R. Dehousse, ‘Institutional Constitutional Reform in the European Community: Are there Alternatives of the Majoritarian Avenue?’ in J. Hayward, *The Crises of Representation in Europe*, (Frank Cass, 1995), 118, 124.

<sup>170</sup> T. Larsson and J. Trondal, ‘Agenda Setting in the European Commission: How does the European Commission Structure and Influence the EU Agenda?’, in H.C.H. Hoffman and A.H. Turk, *EU Administrative Governance* (Edward Elgar, 2006).

contributes to the democratic deficit, since ‘they are born and multiply unrestrained by internal regulation and operate unrestricted by standard rules of procedure’.<sup>171</sup>

The Commission has an online register of expert groups, operating since 2005,<sup>172</sup> but this appears to be seriously incomplete and outdated, since some of the listed groups do not actually exist, and some groups which do exist are not listed on the register. There are also gaps in the information available about the background of the experts, and there have been serious allegations of a systematic corporate bias in the membership of the groups.<sup>173</sup> Although there is a requirement for an annual report on each group, this can be replaced by a link to a relevant website, and some of these links are inoperative. As compared to comitology committees, the register does not list the meetings and documents considered by the expert groups. More broadly, the absence of standard rules governing the delegated acts procedure also means that there are no specific rules on accountability of that procedure to the public. This lack of transparency is unacceptable now that these groups are to be the key mechanism for scrutiny of draft delegated measures. The public cannot exercise sufficient control through the access to documents rules<sup>174</sup> if the available information through the register is not updated.<sup>175</sup>

Although the EP and Commission have already agreed, in the Framework Agreement on their relations, that the Commission will give the EP ‘full information and documentation on its meetings with national experts within the framework of its work on the preparation and implementation’ of EU law, including delegated acts,<sup>176</sup> it is not enough for the expert groups to be accountable to the EP; accountability to the Council and the public should be ensured as well.

At the very least, these groups need to be governed by rules equivalent to those governing comitology committees, which would entail, at least as far as delegated acts are concerned, the complete publication of a list of the groups, the agendas of their meetings, the summary records of meetings, the background of their members, the draft and final acts, statistical data on the functioning of the groups and an annual report on their work.<sup>177</sup> As noted above, however, the application of these rules has anyway been disappointing in practice as regards comitology committees.<sup>178</sup> In any event, since the delegated acts procedure will take over from the RPS procedure, which is covered by the binding rules in question, the net effect

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<sup>171</sup> M. Rhinard, ‘The Democratic Legitimacy of the European Union Committee System’, (2002) 15 *Governance: An International Journal of Policy, Administration, and Institutions*, 185, 198.

<sup>172</sup> See: <[ec.europa.eu/transparency/regexpert/](http://ec.europa.eu/transparency/regexpert/)>.

<sup>173</sup> See: *Secrecy and corporate dominance - a study on the composition and transparency of European Commission Expert Groups* (Alter-EU, 2008), online at: <<http://www.corporatejustice.org/IMG/pdf/expertgroupsreport.pdf>> and Y. Vassalos, ‘expert groups – letting corporate interests set the agenda?’ (Corporate Europe Observatory, 2010), online at: <<http://www.alter-eu.org/sites/default/files/bbb-chap-06.pdf>>.

<sup>174</sup> *Op cit* n 52 *supra*.

<sup>175</sup> See by analogy the contribution of the Courts on the transparency of the comitology documents, *op cit* n 100-102 *supra*.

<sup>176</sup> Point 15 and annex I of the Agreement, [2010] OJ L304/47.

<sup>177</sup> See Art 10, *op cit* n 1 *supra*.

<sup>178</sup> See III.C above.



of creating the delegated acts procedure is to *reduce* the standards for public accountability that previously applied.

### *C Implementing Acts (Article 291 TFEU)*



Soon after the entry into force of the new Treaty, the Commission made a legislative proposal<sup>179</sup> for the implementation of Article 291 TFEU. Following negotiations between the EP and the Council on the Commission's proposal, these institutions reached a 'first-reading' deal which was supported by the EP plenary in December 2010. The new Implementing Acts Regulation was formally adopted in February 2011, and the Regulation came into force on 1 March 2011.<sup>180</sup> The Regulation lays down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.

Compared to the prior rules, and the Commission's proposal, the Regulation now provides for an advisory procedure (as before),<sup>181</sup> plus also an examination procedure (which replaces the prior regulatory and management procedures).<sup>182</sup> The rules on the choice of committee procedure have been amended.<sup>183</sup> Under the examination procedure, normally a QMV of Member States' representatives will be needed to block a draft measure (as in the previous management committee system).<sup>184</sup> If there is a positive vote the Commission must adopt the measure,<sup>185</sup> and if there is no opinion, the Commission *may* adopt it, subject to three exceptions: where the act concerns four sensitive subjects (taxation, financial services, the protection of health or safety of humans, animals or plants or safeguard measures); where the basic act requires a QMV of representatives in favour; or where a simple majority opposes the draft measure.<sup>186</sup> Crucially, the Regulation specifies that existing management procedures were automatically converted to the new system *without* the foregoing exceptions applying, while the existing regulatory procedures were automatically converted to the new system *with* the proviso that a QMV of

<sup>179</sup> COM (2010) 83, 9 Mar 2010.

<sup>180</sup> *Op cit* n 1 *supra*.

<sup>181</sup> Art 4, *op cit* n 1 *supra*. The opinion of the Committee is not legally binding upon the Commission, although it takes the utmost account of that opinion. Existing advisory committees were automatically converted to the new procedure (Art 13(1)(a), *op cit* n 1 *supra*).

<sup>182</sup> Art 5, *op cit* n 1 *supra*.

<sup>183</sup> See the discussion in IV.A above.

<sup>184</sup> Art 5(3), *op cit* n 1 *supra*.

<sup>185</sup> Art 5(2), *op cit* n 1 *supra*.

<sup>186</sup> Art 5(4), *op cit* n 1 *supra*. As noted in section IV.A above, there are no criteria regulating the choice of whether to require QMV in favour in the basic act or not.

Member States' representatives is still necessary to approve a draft measure.<sup>187</sup> Also, as noted above,<sup>188</sup> the RPS remains in force on a transitional basis. The final Regulation therefore retains rather more power for the Member States' representatives than the Commission had proposed.<sup>189</sup>

In place of an appeal to the Council in the event that a draft implementing measure is blocked by Member States' representatives, the Regulation provides for an 'appeal committee' of *Member States' representatives*, which, like the Council in the previous rules, can usually block the draft measure only by a QMV against it.<sup>190</sup> Contrary to the previous rules, the Commission is not obliged to make a proposal to the appeal committee in this case; it can instead submit a revised proposal to the original committee, or drop the proposed measure. Equally the Commission is no longer obliged to adopt the measure concerned, if the appeal committee (as compared to the Council, in the previous rules) does not adopt an opinion. Also, the measure concerned can now formally only be adopted by the Commission, not the Council (or the appeal committee). The Commission normally has one month to submit the draft measure to the appeal committee, or two months to submit a new version of the draft measure to the comitology committee.<sup>191</sup> The appeal committee must normally vote within two months, as opposed to the prior rule of a maximum three months for the Council to act.<sup>192</sup>

There are two forms of derogation from the basic rules in the Regulation. First of all, the Commission can adopt implementing measures in spite of a committee vote blocking them, if the non-adoption of the measure would create 'a significant disruption of [agricultural] markets or a risk for the financial interests of the Union'. The appeal committee can overturn the Commission's decision by QMV.<sup>193</sup> This procedure is a continuation of the previous possibility for the Commission to adopt a draft measure on an interim basis, despite a negative committee vote, while waiting for a Council decision, pursuant to the prior management procedure.<sup>194</sup>

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<sup>187</sup> Art 13(1)(b) and (c), *op cit* n 1 *supra*.

<sup>188</sup> Section IV.A.

<sup>189</sup> See Art 5 of the proposal (*op cit* n 179 *supra*), which would have provided, without exception, that measures could only be blocked by a QMV of representatives. Art 10(1)(b) of the proposal would have converted all existing regulatory procedures to this system.

<sup>190</sup> Art 6, *op cit* n 1 *supra*. There are two derogations: there must be a QMV *in favour* for the Commission to adopt 'definitive multilateral safeguard measures' (Art 6(4)), and until 1 Sep 2012, a simple majority against can block a draft final anti-dumping or anti-subsidy measure (Art 6(5)). The original proposal (*ibid*) did not provide for an appeal committee. Compare to Arts 4(3) and (4) and 5(4) and (6) of the previous comitology decision (*op cit* n 66 *supra*).

<sup>191</sup> Art 5(3) and (4); Art 5(5), *op cit* n 1 *supra* specifies shorter deadlines regarding anti-dumping and anti-subsidy duties.

<sup>192</sup> Art 3(6), *op cit* n 1 *supra*, although Art 3(3) allows the appeal committee chair to set a shorter deadline.

<sup>193</sup> Art 7, *op cit* n 1 *supra*. The Commission had wanted a broader scope of this power: see Art 5(5) of its proposal, *op cit* n 179 *supra*.

<sup>194</sup> See Art 4(3) of the prior comitology decision (*op cit* n 66 *supra*). See also the Commission statement attached to the Reg. Note also that as regards previous procedures which have been converted to the new rules, Art 7, *op cit* n 1 *supra* can only apply where the management procedure previously applied (Art 13(3), *op cit* n 1 *supra*).

Secondly, the Regulation provides for the Commission to adopt immediately applicable measures, bypassing the committees' involvement (Article 8 of the Regulation) only if the basic act provides, subject to a time limit of six months (unless the basic act provides otherwise) and an urgency requirement, and subject to repeal if an examination committee delivers a negative vote.<sup>195</sup> This procedure replaces the prior safeguard procedure, which had also permitted the Commission to act without prior committee control, subject to a Member State appealing the measure concerned to the Council, which could block, approve or take a different view by QMV; it was even possible for a basic act to provide for revocation of a Commission decision, if the Council had not taken a decision.<sup>196</sup> The previous rules had not set any time limits for safeguard measures.

How accountable is the new system to the Member States and the Council? The latter institution has been removed from the comitology procedure entirely (leaving aside RPS), but it instead has gained a 'right of scrutiny', on the same footing as the EP, to object to the Commission where, in its view, a draft implementing act exceeds the powers conferred by the basic act, if the basic act was adopted pursuant to the ordinary legislative procedure. But the Commission is not required to act if the Council objects to the draft implementing act.<sup>197</sup> The Council also has a new right to information on committee proceedings, again on the same footing as the EP.<sup>198</sup>

As for accountability to Member States as such, the prior *status quo* has largely been preserved on a transitional basis, since the voting rules relating to the former regulatory and management procedures have been retained for the time being, and the new appeal committee is largely subject to the same voting rules as the Council previously was. The impact of the Regulation in practice will therefore depend (as regards previous management committees) upon the rate at which pre-existing comitology provisions are amended, and (as regards previous regulatory procedures) on whether new or amended measures take up the option to require a QMV of representatives in favour to approve a draft measure. It might be expected that the Commission will rarely, if ever, propose use of this option, while the Council might often be in favour of it, but the EP will be indifferent since its prerogatives are not affected by this choice. In practice, the only relevant basic act adopted (at time of writing) since the Implementing Acts Regulation came into force does *not* provide for this option.<sup>199</sup> It is odd to provide for a requirement of QMV or a simple majority of Member States' representatives in favour for some implementing measures to be adopted, whereas the voting rule for the Council to block the adoption of delegated acts is QMV *against*.<sup>200</sup>

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<sup>195</sup> Art 8, *op cit* n 1 *supra*. The Commission had wanted the power to keep the measures in force for a further period (Art 6(5) of the proposal, *op cit* n 179 *supra*), but this suggestion was not adopted.

<sup>196</sup> Art 6 of the prior comitology decision (*op cit* n 66 *supra*); the pre-existing safeguard rules have been converted to the new procedure (Art 13(1)(d), *op cit* n 1 *supra*).

<sup>197</sup> Art 11, *op cit* n 1 *supra*, replacing Art 8 of the prior comitology decision; the pre-existing provisions have been converted to the new rules (Art 13(1)(e), *op cit* n 1 *supra*).

<sup>198</sup> Art 10(3) and (4), *op cit* n 1 *supra*, discussed further below.

<sup>199</sup> See Art 14(2) of the Reg on light commercial vehicles, *op cit* n 155 *supra*.

<sup>200</sup> The Commission had made this point in its original proposal for the Implementing Acts Regulation: *op cit* n 179 *supra*, 4.

As for the European Parliament, the Implementing Acts Regulation, as already noted, preserves its pre-existing right of scrutiny, permitting it to object (without binding effect) to the Commission where it believes that a draft implementing act is *ultra vires* a basic act adopted pursuant to the ordinary legislative procedure.<sup>201</sup> Of course, this power is now broader in scope, simply because the scope of the ordinary legislative procedure has been widened considerably by the Treaty of Lisbon. It is not clear whether this right would apply though if the basic act was adopted before the entry into force of the Treaty of Lisbon at a time when the co-decision procedure was not applicable to the area concerned, even if the ordinary legislative procedure would now apply to the basic act in question if it had been adopted after the entry into force of that Treaty. In addition, the EP and the Council are apparently empowered to question the legality of any type of implementing act on *ultra vires* grounds.<sup>202</sup> However, the EP has lost its prior right to complain to the Council regarding an allegedly *ultra vires* measure where the Council was considering a draft of that measure,<sup>203</sup> without a replacement right to raise such a complaint before the appeal committee established by the new Regulation.

The EP has the right to information about committee proceedings, in that the Commission must transfer the agendas, draft acts on which the committees have been asked to deliver an opinion and the final draft acts at the same time as those documents are sent to committee members.<sup>204</sup> The EP also has a right to information ‘in accordance with the applicable rules’ on the list of committees, summary records of committee work (including information on the background of representatives), voting results, adoption of final implementing measures and statistical information.<sup>205</sup> Compared to the prior rules, the right to information now includes statistical data and material on final implementing acts, and the EP will now receive information on all draft implementing measures, not just on those measures implementing basic acts adopted by means of the co-decision procedure.<sup>206</sup>

While the EP therefore has an increased right to information as regards committee proceedings and arguably an increased right of scrutiny, it has not been given any control powers (leaving aside the pre-existing RPS). But it is impossible to give such powers to the EP (or the Council), due to the fundamental distinction in Articles 290 and 291 TFEU between the role of the EU legislators and the role of the Member States.<sup>207</sup>

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<sup>201</sup> *Op cit* n 1 *supra*. The Commission’s original proposal (*op cit* n 179 *supra*) would have deleted this right entirely.

<sup>202</sup> Recital 18 of the preamble, *op cit* n 1 *supra*. Compare to recital 9 of the preamble to the previous comitology decision, *op cit* n 66 *supra*.

<sup>203</sup> Art 5(5) of the prior comitology decision, *ibid*.

<sup>204</sup> Art 10(4), *op cit* n 1 *supra*.

<sup>205</sup> Art 10(3), *op cit* n 1 *supra*.

<sup>206</sup> Compare to Art 7(3) of the prior comitology decision, *op cit* n 66 *supra*. The EP’s right to be informed where the Commission transmits proposals to the Council has not been replaced by an explicit right to be informed where the Commission makes proposals to the appeal committee, but then the proceedings before the appeal committee will be covered by the EP’s general right to information on the committees.

<sup>207</sup> See further IV.A above.

As for accountability to the public, unfortunately, the Implementing Acts Regulation does not provide for enhanced transparency rights at all, because there is still no obligation to make any information on committee proceedings, as distinct from references to documents in the comitology register, directly available to the public.<sup>208</sup> Although the information referred to in the register now includes statistical data, information on final implementing acts and all draft acts (not just draft acts implementing a basic act adopted by means of the co-decision procedure), the fact remains that this information need only be listed in the register, not available directly. It is ironic that the Commission defines full transparency only with reference to the Council and the EP and not the general public. By doing so, it defeats the very purpose of transparency, which is namely for the public to hold decision-makers to account.<sup>209</sup> The adoption of the Implementing Acts Regulation was therefore a missed opportunity to improve the standards of transparency in this area.<sup>210</sup>

Moreover, comitology meetings will continue to take place behind closed doors. The EP did not even try opening committee doors. In order to enhance democratic accountability, a selected public could be allowed to attend comitology meetings and/or these meetings could be broadcast. Another option could be a notice and comment procedure so the interested groups and the members of the general public could make their views known to these committees.<sup>211</sup> In this way, political control of comitology can be exercised by 'alternative technical experts and a technical partial public',<sup>212</sup> who could then liaise with MEPs in such a way as to perform a 'fire alarm' function. For the practical political process, this would imply that MEPs would be informed whenever issues of great political sensitivity come up and the EP could thus resort to its control functions under comitology.

The EP proposed to solve this problem by arguing during the negotiations of the second comitology Decision<sup>213</sup> that MEPs *themselves* should attend comitology committee meetings rather than having to rely on external actors. This view was rejected by the Commission and the Council on the basis that enhanced information rights of the EP and the public might solve the problem,<sup>214</sup> but as discussed already, previous experience revealed that this is not sufficient to remedy the accountability deficit.

## V Conclusion: More accountability of the committee-based system after the Treaty of Lisbon?

<sup>208</sup> Compare Art 10(5), *op cit* n 1 *supra*, to Art 7(5) of the prior rules, *op cit* n 66 *supra*.

<sup>209</sup> Commission Press Release IP/10/1735, 16 Dec 2010.

<sup>210</sup> On the deficiencies of these standards in practice, see III.C above.

<sup>211</sup> See F. Bignami, 'The democratic deficit in European Community rulemaking: a call for notice and comment in comitology', (1999) 40 *Harvard International Law Journal*, 451.

<sup>212</sup> H. Hofmann and A. Toeller, 'Democracy and the reform of comitology', in A. Mads and A. Tuerk, *Delegated Legislation and the Role of Committees in the EC* (Kluwer Law International, 2000).

<sup>213</sup> *Op cit* n 65 *supra*.

<sup>214</sup> G. Schusterschitz and S. Kotz, 'The Comitology Reform of 2006. Increasing the Powers of the European Parliament Without Changing the Treaties', (2007) 3 *European Constitutional Law Review* 68.

The Lisbon Treaty attempted to rectify the accountability inadequacies of the comitology committees, by replacing them with a two-part framework with conceptually different types of control procedures. The Treaty provides for sufficient possibilities in Articles 290 and 291 TFEU to establish an adequate accountability framework as regards the exercise of the delegated and implementing acts. Notably, the EP and the Council have the powers to control ex ante and ex post the delegated powers of the Commission in relation to delegated acts, while the Member States in practice will retain most of their prior powers as regards implementing acts.

It is regrettable, however, that the new procedures are not sufficiently transparent to ensure accountability to the public. In particular, the opportunity to improve transparency standards as regards implementing measures has been missed, and the standards in relation to delegated acts are lower than those which previously applied to RPS, taking into account the absence of binding rules and the opaqueness of the Commission's expert groups. After all, the ultimate accountability forum is the general public. More democratic control through the EP is welcome and impressive in theory but in practice, as far the general public is concerned little has changed. Citizens need to be aware of what is happening in order to hold the Commission and the legislature into account.